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AN INTRODUCTION TO THE STUDY OF THE AMERICAN CONSTITUTION

AN INTRODUCTION TO THE STUDY OF THE AMERICAN CONSTITUTION

A STUDY OF THE FORMATION AND DEVELOPMENT OF THE AMERICAN CONSTITUTIONAL SYSTEM AND OF THE IDEALS UPON WHICH IT IS BASED WITH ILLUSTRATIVE MATERIALS

BY

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To

My Father

EMANUEL COBB MARTIN

WHOSE PRECEPT AND EXAMPLE AS AN AMERICAN CITIZEN
DEVOTED TO HIS COUNTRY'S INSTITUTIONS
HAVE INFLUENCED ME MORE PROFOUNDLY
THAN THE ERUDITION OF ALL THE DOCTORS AND JUDGES
LEARNED IN THE LAW

PREFACE

Chief Justice Marshall, in his most celebrated decision, said, " We must never forget that it is a constitution we are expounding." No principle of the American government and its institutions is more fundamental than this, and any one who aims to discuss and explain the Constitution of the United States should keep it steadily in view.

The people of the United States have prescribed, by means of a written constitution, rules for the exercise of sovereign power. The instrument defines the rights and duties of the government, distributes its powers, prescribes the mode of their exercise, and limits them in behalf of civil and political liberty. It sets up a framework of government; it lays down main principles of fundamental law which are meant to be of general and permanent application. It represents the mature and reasoned will of the sovereign authority in contrast with the evanescent will of majorities.

The Constitution is not approached as an object of political witchcraft which works through some mystical charm of its own. It is a skeleton which supports living organisms. It gives form and substance to the organism, but the life is elsewhere. An instrument of law, no matter how fundamental, is cold and lifeless without the contact of human personalities. Ours is a government of laws, but a government by men.

Nor is the Constitution approached as an instrument which has outlived its usefulness and which has seen its day. No one should be blind to the defects of our Constitution or of our system of government. While the value of constitutional criticism should be recognized, no one can deny to the document its position of primacy among the constitutions of government of the world, for it is " the most wonderful work ever struck off at a given moment by the hand and purpose of man."

How properly to deal with growing criticism of the Constitution is a problem which must be wisely but surely attacked. It has two aspects. The first has to do with its effect upon our institutions today. Those who would tear the Constitu-

tion to shreds are generally the first who seek to cover themselves with its protective measures when called to account for their conduct. Infractions of and vicious assaults upon the Constitution should be punished. The best answer to direct action, however, is the preservation, rather than the suspension of constitutional guarantees, and should be dealt with as it interferes with these guarantees. Individuals and organizations whose purpose is anarchy and destruction of law receive only aid and comfort when we resist their efforts by making ourselves a party to the act of destruction. However wrong they may be, and as much as we may detest their motives, it is better that justice be done, rather than denied. The Constitution is the stronger in the end.

The second aspect has to do with the effect of this criticism on the youth of the land, especially students of the form and ideals of our government. The problem is not how this criticism can be removed, but how it may be made intelligent, constructive, helpful, and how it can be made to serve some useful purpose. Moreover, it is submitted that the time is at hand for some constitutional appreciation to displace so much constitutional abuse. To meet this problem, many of the state legislatures, inspired by the American Bar Association and the bar associations of the states concerned, have determined that our young people shall *know the Constitution* — not merely something *about the Constitution.* This can have only one meaning. Students must study the fundamental instrument, and not merely about it.

The purpose of this book is to furnish the student and the general reader with an introductory study of the American Constitution. It embraces the formation of our constitutional system from the time of English and colonial origins to its framing and adoption; its evolution from the time of its first trial to the present day; and its spirit, ideals, and institutions. The material is presented under appropriate headings for the convenience of the student and reader, but the plan of a continuous treatment of the subject is maintained throughout.

Reading lists are appended to each chapter as a guide for further study and investigation. Constitutional documents of first importance are included in the appendix, together with interesting information about men and institutions which have helped to mould our constitutional system. I have become

convinced through experience of the disciplinary utility of the " case system," when used in moderation. The teaching of government by discussion has an unqualified instructional value. The teacher is the intellectual leader of a study group. Controversial and unsettled subjects lend themselves readily to this type of instruction. These considerations have dictated the choice of materials.

Controversial questions have been dealt with. It has been the author's purpose to discuss and not to decide them. I have tried faithfully to interpret the decisions of the Supreme Court and the deliberate judgment of the American people on the Constitution for those who seek light on the subject. Since the Constitution is its own best justification, its text appears before the subject-matter.

I am indebted especially to Dean M. L. Darsie and Professor Marshall F. McComb of the University of California, Southern Branch, whose counsel and coöperation have made the preparation of this study an inspiration. I am glad to express my gratitude to Professor William H. George of the University of Washington for kindly counsel in regard to this study, and for his sustained interest in my every undertaking. My acknowledgments are also due Professor W. B. Munro of Harvard University and Judge Louis W. Myers, formerly Chief Justice of the Supreme Court of California, whose interest in sound instruction on the fundamentals of the Constitution has been a light unto my pathway, and a lamp unto my feet. The helpful suggestions of Professor Charles G. Haines of the University of California, Southern Branch, have guided me over a number of difficult places. I shall perpetually benefit from the instruction of Dr. Charles A. Beard, formerly my teacher in politics at Columbia University. The personality of this inspired teacher is indelibly impressed on all who have been so fortunate as to pass through his classes. Finally, I would mention my obligation to my students, whose collective judgment has helped me in the selection of materials. Such facts, ideas, and materials as appear here have been tried out on the average college undergraduate, and have met with a cordial response. I hope that this verdict may be sustained by the potential student of our political institutions.

Charles E. Martin

University of Washington,
Seattle, February 1, 1926.

PREFACE TO THE SECOND EDITION

The *Introduction to the Study of the American Constitution* now goes into its second edition. The contents remain substantially as contained in the first edition. Several sections have been completely re-written with a view to meeting more definitely the needs of all students and readers who desire an introductory study of the American Constitution. In making these limited revisions, I have followed the suggestions of a number of professors and members of the bench and bar who have, through their teaching, their practice, or their research, a professional interest in things constitutional, and a genuine public interest in making the principles and events of our constitutional life known to the people. In a book which attempts to discuss so large a subject within a reasonably small compass, mistakes are inevitable. I am indebted to several persons who have had the interest and the consideration to call to my attention a few mistakes which they have noticed. They have been rectified in the present edition. A brief note on *Myers* v. *United States* appears on page 240. No revision, however slight, would be complete without reference to this significant decision.

The cordial reception of the book by members of the bench and bar, teachers, students and the public, has heartened the author. The people of the United States are interested in their political institutions. The American Bar Association, through its Special Committee to select reference books on the Constitution, has included it as one of Class " A " group, which is described as " indispensable for students of the Constitution of all ages, and particularly in schools and colleges." This distinguished approval is fully appreciated by the author. There has also been an unusual interest in the book in England and the British Dominions. Indeed, the English study American Institutions much more than Americans study English Institutions.

I am under deep obligation to Mr. F. Dumont Smith, Chairman of the Committee on American Citizenship of the American Bar Association. His suggestions for the new edition

have been most helpful. Dean A. J. Schweppe and Professor Clark P. Bissett of the University of Washington Law School have rendered substantial aid, both in the first and the revised editions. Mr. H. V. Clulow, of the Oxford University Press, has been unfailing in kindly counsel and coöperation. He has made the relations between publisher and author delightful in every way.

CHARLES E. MARTIN

University of Washington,
Seattle, February 15, 1928.

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THE CONSTITUTION OF THE UNITED STATES [1]

We the people of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article I

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Rep-

[1] Text of Constitution and Notes are taken from The Constitution of the United States of America (Annotated), compiled by George Gordon Payne.

resentatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath

or Affirmation. When the President of the United States is tried the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace,

be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal; and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by

the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; — And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay

any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Article II

Section 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like

Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: — "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of

the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall

hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States, — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not Committed within any State, the trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Article IV

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe

the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Article V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress;

Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Article VI

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Article VII

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth. In witness whereof We have hereunto subscribed our Names.

Go Washington — *Presidt*
and deputy from Virginia.

Attest William Jackson, *Secretary*

NEW HAMPSHIRE	JOHN LANGDON NICHOLAS GILMAN
MASSACHUSETTS	NATHANIEL GORHAM RUFUS KING
CONNECTICUT	WM. SAML. JOHNSON ROGER SHERMAN
NEW YORK	ALEXANDER HAMILTON
NEW JERSEY	WIL: LIVINGSTON DAVID BREARLEY WM. PATERSON JONA: DAYTON
PENNSYLVANIA	B FRANKLIN THOMAS MIFFLIN ROBT. MORRIS GEO. CLYMER THOS. FITZSIMONS JARED INGERSOLL JAMES WILSON GOUV MORRIS
DELAWARE	GEO: READ GUNNING BEDFORD jun JOHN DICKINSON RICHARD BASSETT JACO: BROOM
MARYLAND	JAMES MCHENRY DAN OF ST. THOS. JENIFER DANL. CARROLL
VIRGINIA	JOHN BLAIR— JAMES MADISON JR.
NORTH CAROLINA	WM. BLOUNT RICHD. DOBBS SPAIGHT HU WILLIAMSON
SOUTH CAROLINA	J. RUTLEDGE CHARLES COTESWORTH PINCKNEY CHARLES PINCKNEY PIERCE BUTLER
GEORGIA	WILLIAM FEW ABR BALDWIN

In Convention Monday, September 17th 1787.

Present

The States of

New Hampshire, Massachusetts, Connecticut, Mr. Hamilton from New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia. Resolved,

That the preceding Constitution be laid before the United States in Congress assembled, and that it is the Opinion of this Convention, that it should afterwards be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the Recommendation of its Legislature, for their Assent and Ratification; and that each Convention assenting to, and ratifying the Same, should give Notice thereof to the United States in Congress assembled.

Resolved, That it is the Opinion of this Convention, that as soon as the Conventions of nine States shall have ratified this Constitution, the United States in Congress assembled should fix a Day on which Electors should be appointed by the States which shall have ratified the same, and a day on which the Electors should assemble to vote for the President, and the Time and Place for commencing Proceedings under this Constitution. That after such Publication the Electors should be appointed, and the Senators and Representatives elected: That the Electors should meet on the Day fixed for the Election of the President, and should transmit their Votes certified, signed, sealed and directed, as the Constitution requires, to the Secretary of the United States in Congress assembled, that the Senators and Representatives should convene at the Time and Place assigned; that the Senators should appoint a President of the Senate, for the sole Purpose of receiving, opening and counting the Votes for President; and, that after he shall be chosen, the Congress, together with the President, should, without Delay, proceed to execute this Constitution.

By the Unanimous Order of the Convention.

Go. Washington, *Presidt.*

W. Jackson, *Secretary.*

AMENDMENTS TO THE CONSTITUTION[1]

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Amendment III

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[1] The first ten amendments to the Constitution of the United States were proposed to the legislatures of the several States by the First Congress, on the 25th of September, 1789. They were ratified by the following States, and the notifications of ratification by the governors thereof were successively communicated by the President to Congress: New Jersey, November 20, 1789; Maryland, December 19, 1789; North Carolina, December 22, 1789; South Carolina, January 19, 1790; New Hampshire, January 25, 1790; Delaware, January 28, 1790; Pennsylvania, March 10, 1790; New York, March 27, 1790; Rhode Island, June 15, 1790; Vermont, November 3, 1791, and Virginia, December 15, 1791. There is no evidence on the journals of Congress that the Legislatures of Connecticut, Georgia, and Massachusetts ratified them.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment XI [2]

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Amendment XII [3]

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; — The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; — The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest

[2] The eleventh amendment was submitted to the legislatures of the several States by a resolution of Congress passed on the 5th of March, 1794, at the first session of the Third Congress; and on the 8th of January, 1798, at the second session of the Fifth Congress, it was declared by the President, in a message to the two Houses of Congress, to have been adopted by the legislatures of three-fourths of the States, there being at that time sixteen States in the Union.

[3] The twelfth amendment was submitted to the legislatures of the several States, there being then seventeen States, by a resolution of Congress passed on the 12th of December, 1803, at the first session of the Eighth Congress, and was ratified by the legislatures of three-fourths of the States in 1804, according to a proclamation of the Secretary of State dated the 25th of September, 1804.

numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. — The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

Amendment XIII [4]

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been

[4] The thirteenth amendment was submitted to the legislatures of the several States, there being then 36 States, by a resolution of Congress passed on the 1st of February, 1865, at the second session of the Thirty-eighth Congress, and was ratified, according to a proclamation of the Secretary of State dated Dec. 18, 1865, by the legislatures of the following States: Illinois, Feb. 1, 1865; Rhode Island, Feb. 2, 1865; Michigan, Feb. 2, 1865; Maryland, Feb. 3, 1865; New York, Feb. 3, 1865; West Virginia, Feb. 3, 1865; Maine, Feb. 7, 1865; Kansas, Feb. 7, 1865; Massachusetts, Feb. 8, 1865; Pennsylvania, Feb. 8, 1865; Virginia, Feb. 9, 1865; Ohio, Feb. 10, 1865; Missouri, Feb. 10, 1865; Indiana, Feb. 16, 1865; Nevada, Feb. 16, 1865; Louisiana, Feb. 17, 1865; Minnesota, Feb. 23, 1865; Wisconsin, Mar. 1, 1865; Vermont, Mar. 9, 1865; Tennessee, Apr. 7, 1865; Arkansas, Apr. 20, 1865; Connecticut, May 5, 1865; New Hampshire, July 1, 1865; South Carolina, Nov. 13, 1865; Alabama, Dec. 2, 1865; North Carolina, Dec. 4, 1865; Georgia, Dec. 9, 1865.

The following States ratified this amendment, subsequent to the date of the proclamation of the Secretary of State, as follows: Oregon, Dec. 11, 1865; California, Dec. 20, 1865; Florida, Dec. 28, 1865; New Jersey, Jan. 23, 1866; Iowa, Jan. 24, 1866; Texas, Feb. 18, 1870.

duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Amendment XIV [5]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State,

[5] The fourteenth amendment was submitted to the legislatures of the several States, there being then 37 States, by a resolution of Congress passed on the 16th of June, 1866, at the first session of the Thirty-ninth Congress, and was ratified, according to a proclamation of the Secretary of State dated July 28, 1868, by the legislatures of the following States: Connecticut, June 30, 1866; New Hampshire, July 7, 1866; Tennessee, July 19, 1866; New Jersey, Sept. 11, 1866 (withdrew her consent to the ratification in April, 1868); Oregon, Sept. 19, 1866 (withdrew her consent to the ratification Oct. 15, 1868); Vermont, Nov. 9, 1866; New York, Jan. 10, 1867; Ohio, Jan. 11, 1867 (withdrew her consent to the ratification in January, 1868); Illinois, Jan. 15, 1867; West Virginia, Jan. 16, 1867; Kansas, Jan. 18, 1867; Maine, Jan. 19, 1867; Nevada, Jan. 22, 1867; Missouri, Jan. 26, 1867; Indiana, Jan. 29, 1867; Minnesota, Feb. 1, 1867; Rhode Island, Feb. 7, 1867; Wisconsin, Feb. 13, 1867; Pennsylvania, Feb. 13, 1867; Michigan, Feb. 15, 1867; Massachusetts, Mar. 20, 1867; Nebraska, June 15, 1867; Iowa, Apr. 3, 1868; Arkansas, Apr. 6, 1868; Florida, June 9, 1868; North Carolina, July 4, 1868; Louisiana, July 9, 1868; South Carolina, July 9, 1868; Alabama, July 13, 1868; Georgia, July 21, 1868.

The State of Virginia ratified this amendment on the 8th of October, 1869, subsequent to the date of the proclamation of the Secretary of State, having theretofore rejected it.

North Carolina, South Carolina, and Georgia had rejected the amendment prior to the dates of ratification noted.

The States of Delaware, Maryland, Kentucky, and Texas rejected this amendment.

being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Amendment XV [6]

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any

[6] The fifteenth amendment was submitted to the legislatures of the several States, there being then 37 States, by a resolution of Congress passed on the 27th of February, 1869, at the first session of the Forty-first Congress; and was ratified, according to a proclamation of the Secretary of State dated Mar. 30, 1870, by the legislatures of the following States: Nevada, Mar. 1, 1869; West Virginia, Mar. 3, 1869; North Carolina, Mar. 5, 1869; Louisiana, Mar. 5, 1869; Illinois, Mar. 5, 1869; Michigan, Mar. 8, 1869; Wisconsin, Mar. 9, 1869; Massachusetts, Mar. 12, 1869; Maine, Mar. 12, 1869; South Carolina, Mar. 16, 1869; Pennsylvania, Mar. 26, 1869; Arkansas, Mar. 30, 1869; New York, Apr. 14, 1869 (withdrew her consent to the ratification Jan. 5, 1870); Indiana, May 14, 1869; Connecticut, May 19, 1869; Florida, June 15,

State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XVI [7]

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Amendment XVII [8]

The Senate of the United States shall be composed of two

1869; New Hampshire, July 7, 1869; Virginia, Oct. 8, 1869; Vermont, Oct. 21, 1869; Alabama, Nov. 24, 1869; Missouri, Jan. 10, 1870; Mississippi, Jan. 17, 1870; Rhode Island, Jan. 18, 1870; Kansas, Jan. 19, 1870; Ohio, Jan. 27, 1870 (Ohio had previously rejected the amendment May 4, 1869); Georgia, Feb. 2, 1870; Iowa, Feb. 3, 1870; Nebraska, Feb. 17, 1870; Texas, Feb. 18, 1870; Minnesota, Feb. 19, 1870.

The State of New Jersey ratified this amendment on the 21st of February, 1871, subsequent to the date of the proclamation of the Secretary of State (New Jersey had previously rejected the amendment).

The States of California, Delaware, Kentucky, Maryland, Oregon, and Tennessee rejected this amendment.

[7] The sixteenth amendment was submitted to the legislatures of the several States, there being then 48 States, by a resolution of Congress passed on July 12, 1909, at the first session of the Sixty-first Congress, and was ratified according to a proclamation of the Secretary of State dated February 25, 1913, by the legislatures of the following States: Alabama, Aug. 17, 1909; Kentucky, Feb. 8, 1910; South Carolina, Feb. 23, 1910; Illinois, Mar. 1, 1910; Mississippi, Mar. 11, 1910; Oklahoma, Mar. 14, 1910; Maryland, Apr. 8, 1910; Georgia, Aug. 3, 1910; Texas, Aug. 17, 1910; Ohio, Jan. 19, 1911; Idaho, Jan. 20, 1911; Oregon, Jan. 23, 1911; Washington, Jan. 26. 1911; California, Jan. 31, 1911; Montana, Jan. 31, 1911; Indiana, Feb. 6, 1911; Nevada, Feb. 8, 1911; Nebraska, Feb. 11, 1911; North Carolina, Feb. 11, 1911; Colorado, Feb. 20, 1911; North Dakota, Feb. 21, 1911; Michigan, Feb. 23, 1911; Iowa, Feb. 27, 1911; Kansas, Mar. 6, 1911; Missouri, Mar. 16, 1911; Maine, Mar. 31, 1911; Tennessee, Apr. 11, 1911; Arkansas, Apr. 22, 1911; Wisconsin, May 26, 1911; New York, July 12, 1911; South Dakota, Feb. 3, 1912; Arizona, Apr. 9, 1912; Minnesota, June 12, 1912; Louisiana, July 1, 1912; Delaware, Feb. 3, 1913; Wyoming, Feb. 3, 1913; New Jersey, Feb. 5, 1913; New Mexico, Feb. 5, 1913.

The States of Connecticut, Rhode Island, and Utah rejected this amendment.

The following States ratified this amendment subsequent to date of the proclamation of the Secretary of State, as follows: Vermont, Massachusetts, New Hampshire, and West Virginia.

[8] The seventeenth amendment was submitted to the legislatures of

Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided,* That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

Amendment XVIII [9]

Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating

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the several States, there being then 48 States, by a resolution of Congress passed on 16th day of May, 1912, at the second session of the Sixty-second Congress, and was ratified, according to a proclamation of the Secretary of State dated May 31, 1913, by the legislatures of the following States: Massachusetts, May 22, 1912; Arizona, June 3, 1912; Minnesota, June 10, 1912; New York, Jan. 15, 1913; Kansas, Jan. 17, 1913; Oregon, Jan. 23, 1913; North Carolina, Jan. 25, 1913; California, Jan. 28, 1913; Michigan, Jan. 28, 1913; Idaho, Jan. 31, 1913; West Virginia, Feb. 4, 1913; Nebraska, Feb. 5, 1913; Iowa, Feb. 6, 1913; Montana, Feb. 7, 1913; Texas, Feb. 7, 1913; Washington, Feb. 7, 1913; Wyoming, Feb. 11, 1913; Colorado, Feb. 13, 1913; Illinois, Feb. 13, 1913; North Dakota, Feb. 18, 1913; Nevada, Feb. 19, 1913; Vermont, Feb. 19, 1913; Maine, Feb. 20, 1913; New Hampshire, Feb. 21, 1913; Oklahoma, Feb. 24, 1913; Ohio, Feb. 25, 1913; South Dakota, Feb. 27, 1913; Indiana, Mar. 6, 1913; Missouri, Mar. 7, 1913; New Mexico, Mar. 15, 1913; New Jersey, Mar. 18, 1913; Tennessee, Apr. 1, 1913; Arkansas, Apr. 14, 1913; Connecticut, Apr. 15, 1913; Pennsylvania, Apr. 15, 1913; Wisconsin, May 9, 1913.

[9] The eighteenth amendment was submitted to the legislatures of the several States, there being then 48 States, by a Resolution of Congress passed on 17th day of December, 1917, at the second session of the Sixty-fifth Congress, and was ratified, according to a proclamation of the Acting Secretary of State dated Jan. 29, 1919, by the legislatures of the following States: Mississippi, Jan. 8, 1918; Virginia, Jan. 11, 1918; Kentucky, Jan. 16, 1918; North Dakota, Jan. 28, 1918; South Carolina, Feb. 12, 1918; Montana, Feb. 20, 1918; Texas, Mar. 4, 1918; Maryland, Mar. 12, 1918; South Dakota, Mar. 22, 1918; Delaware, Mar. 26, 1918; Massachusetts, Apr. 2, 1918; Arizona, May 23, 1918; Georgia, July 2, 1918; Louisiana, Aug. 9, 1918; Florida, Dec. 3, 1918; Michigan, Jan. 2, 1919; Oklahoma, Jan. 7, 1919; Ohio, Jan. 7, 1919; Idaho, Jan. 8, 1919; Maine, Jan. 8, 1919; West Virginia, Jan. 9, 1919; Washington, Jan. 13, 1919; California, Jan. 13, 1919; Illinois, Jan. 14,

liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Amendment XIX [10]

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

1919; Indiana, Jan. 14, 1919; Kansas, Jan. 14, 1919; Tennessee, Jan. 14, 1919; Arkansas, Jan. 14, 1919; New Hampshire, Jan. 15, 1919; Colorado, Jan. 15, 1919; Alabama, Jan. 15, 1919; Oregon, Jan. 15, 1919; Nebraska, Jan. 16, 1919; North Carolina, Jan. 16, 1919; Utah, Jan. 16, 1919; Minnesota, Jan. 17, 1919; Wyoming, Jan. 17, 1919; Wisconsin, Jan. 17, 1919; Missouri, Jan. 17, 1919; Nevada, Jan. 17, 1919; New Mexico, Jan. 22, 1919; Iowa, Jan. 27, 1919; Vermont, Jan. 29, 1919; New York, Jan. 29, 1919; Pennsylvania, Feb. 26, 1919.

[10] The nineteenth amendment was submitted to the legislatures of the several States, there being then 48 States, by a resolution of Congress passed on 5th day of June, 1919, at the first session of the Sixty-sixth Congress, and was ratified, according to a proclamation of the Secretary of State dated Aug. 26, 1920, by the legislatures of the following States: Illinois, June 10, 1919; Michigan, June 10, 1919; Wisconsin, June 11, 1919; Ohio, June 16, 1919; Kansas, June 16, 1919; New York, June 16, 1919; Massachusetts, June 25, 1919; Pennsylvania, June 27, 1919; Texas, June 28, 1919; Iowa, July 2, 1919; Missouri, July 3, 1919; Arkansas, July 28, 1919; Nebraska, Aug. 2, 1919; Montana, Aug. 2, 1919; Minnesota, Sept. 8, 1919; New Hampshire, Sept. 10, 1919; Utah, Oct. 2, 1919; California, Nov. 1, 1919; Maine, Nov. 5, 1919; South Dakota, Dec. 4, 1919; North Dakota, Dec. 5, 1919; Colorado, Dec. 15, 1919; Rhode Island, Jan. 6, 1920; Oregon, Jan. 13, 1920; Indiana, Jan. 16, 1920; Kentucky, Jan. 19, 1920; Wyoming, Jan. 27, 1920; Nevada, Feb. 7, 1920; Idaho, Feb. 11, 1920; Arizona, Feb. 12, 1920; New Jersey, Feb. 17, 1920; New Mexico, Feb. 21, 1920; Oklahoma, Feb. 28, 1920; West Virginia, Mar. 13, 1920; Washington, Mar. 22, 1920; Tennessee, Aug. 24, 1920; Connecticut, Sept. 14, 1920; Vermont, Feb. 8, 1921.

The States of Alabama, Virginia, and Maryland rejected this amendment.

PART I

THE FORMATION OF THE AMERICAN CONSTITUTIONAL SYSTEM

Definition of Constitution

"A constitution," in the language of the Supreme Court of Connecticut, "is that body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised; and its provisions are the rules of conduct for those branches of the government which exercise the sovereign power."

In addition to the written instrument, it is a collection of laws, customs and practices which have grown up around the Constitution of the United States and the constitutions of the states.

It is necessary to consider the Constitution historically. Thus, the Constitution as a finality from the standpoint of the original written instrument alone disappears. Only in this way do we get an evolutionary view of our progress as a nation.

The Constitution was an answer to a demand for more effective control of the Union by the government. To understand it requires a study not only of the forms of American control preceding the Constitution, but of imperial control by Great Britain. There was a logical transplanting of political ideas from England to the Colonies, and from the Colonies to the new state.

AN INTRODUCTION TO THE STUDY OF THE AMERICAN CONSTITUTION

CHAPTER I

LEGAL AND POLITICAL IDEAS OF THE BRITISH SYSTEM FINDING A PLACE IN THE COLONIAL SYSTEM

I. The doctrine of royal prerogative.

In some of the colonies, the chief executive enjoyed certain of the prerogatives of the British Crown. The reaction against the exercise of this high prerogative led to the divorcing of the governor of many of his powers, by the people.

II. The leading prerogatives.

Legislative. At the beginning of the seventeenth century, the King had large ordinance powers. Chief among these were the power of veto and the power to dissolve the legislature. Most of the powers enjoyed by the governors were eventually taken away. *Taxation.* Some of this power was retained until 1688. Its exercise in the colonies was almost negligible. *Judicature.* The Crown appointed all judges, and the king himself enjoyed judicial power. The Star Chamber Court was the court of the Crown. The influence of royal prerogative was seen in our Courts of Chancery where the governor was the presiding officer. The governor, as the personal representative of the Crown, in the main appointed the judges in the Colonies. *Administration.* Here prerogative was practically complete. The governor's power was guaranteed by and authorized by charter corporations. The colonists, fearing so great a grant and guarantee of executive authority under a formal instrument, purposely made the Articles of Confederation weak from the standpoint of administrative authority.

III. The idea of the corporation.

The idea and the history of the corporation begins with the earliest history of America. It flows from and is a creature

of the Crown. According to Blackstone, it is an embryonic state, and has the following rights and powers: 1. Perpetual succession; 2. The members choose their successors; 3. A common seal, the outward sign of its impersonal and artificial character; 4. Some sort of organization through which it makes by-laws and provides for their enforcement; 5. The right to sue and be sued; 6. The right to buy and sell land and other property; 7. The right to be represented by its agent. Many of the ideas of government in the colonies were derived from the theory of the corporation.

IV. Feudal elements in the Colonial system.

The subjection of certain classes was legally provided for. Slavery was a natural result of the agricultural and economic system of the time. Indentures of servitude were recognized. Certain classes were distinctly outside the Constitution as first framed. The history of recruiting our population has never been investigated thoroughly. At one time, two-thirds of the settlers in Pennsylvania were bond-servants. Many were brought over as criminals. The patroon system of New York was a feudal régime in miniature. The patroon was in effect a feudal lord. This element was opposed to the ratification of the Constitution.

V. Conflict of religious theories.

The theocratic and the congregational elements stand out in bold relief. The attitude of the Crown was expressed by James I, who said: "No Bishop, No King." The demand for religious liberty and equality was coincident with that for political equality, and contributed profoundly to democracy in New England.

VI. Popular participation in British national and local government.

Such participation was allowed an owner of land amounting to forty shillings a year under Henry VI. Even so, much of the government was carried on by means of closed corporations. The striking feature is the small participation of the masses even in local government, which was almost wholly in the hands of the justices of the peace appointed by the king. At the close of the eighteenth century, not more than 150,000 took part in the parliamentary elections.

VII. The Revolution of 1688 and its effect on the colonies.

This revolution resulted in the substitution of the dominion of parliament for the power of the Crown. The Crown was thus forced to accept the commercial element as advisers. The rich merchants bought up the estates of the country and became members of the nobility or gentry. The merchants and commercial classes became more important in the parliament, and their influence was reflected in the colonies. The Revolution let loose a flood of political ideas which found their way into the colonies. The writings of Locke became the political text-book of Adams and Otis, and through his writings they began to inquire into the sources and permanence of authority. His ideas were incorporated into the Declaration of Independence, which served as a justification of the American Revolution.

READING

BLACKSTONE. *Commentaries.*
BORGEAUD. *The Rise of Modern Democracies.*
BRYCE. *Studies in History and Jurisprudence.*
FORD. *Representative Government.*
WHITE. *The Making of the English Constitution.*

CHAPTER II

THE CONSTITUTIONAL SYSTEM OF THE COLONIES

I. The constitutional organization of a royal or provincial colony (Virginia).

A. The influence of geography. In Virginia, carriage by water was convenient and reasonable. Indentation multiplied the sea-front mileage and possible harbors. This had its influence upon the constitution of Virginia. In time, the great plantation became the effective economic unit. The inevitable result was a planting aristocracy, and county government in contradistinction to town government. The local government of Virginia was much like that of England. The common people had slight participation in the government. This system, while undemocratic, produced a number of great statesmen.

B. The fundamental law of the colony. There were three charters, under the dates of 1606, 1608, and 1612. The main lines of the Virginia constitutional system were laid down in these charters. In the year 1624 the colony became provincial, and the constitution was found thereafter in the governors' commissions. Another source of the Virginia constitution was the instructions issued to the governors. Still another source was the statutory law of the House of Burgesses. Around the law grew a body of custom and practices with reference to appointments, and other functions of government. The first charter reserved large powers to the Crown. Later certain legislative and appointive powers were given to the council or Company. Still later the entire power was conferred upon the Company. In 1624, these institutions were taken over by the Crown, and in place of the Company's governor and council, there were substituted royal officials.

C. The royal governor. He had the usual executive powers: the duty to establish working relations with the council, to fill vacancies in the council, to make laws with the coöperation of the council, and to appoint judges, and military and naval commanders.

D. The governor and the council. The council was composed of twelve of the principal gentlemen of the country. The governor and five members of the council constituted the Court with civil and criminal jurisdiction, and also served as a Court of Chancery. The council aided the governor in the disposition of lands, which were often granted to his favorites. It also aided the governor in the distribution of the revenue, and in the matter of war and peace with the Indians. Most of the governor's duties were subject to the approval of the council, which also served as an upper house of the legislature.

E. The House of Burgesses. This house appeared in 1619. The first call for the House stipulated that it should consist of the governor, the council, and two representatives from each plantation, hundred or ward. This system was continued until about 1680, when the two houses were separated. The qualifications of members were not definite, but they were, in the main, men of wealth.

The governor and the Burgesses were in constant conflict. The colonists claimed all the rights of Englishmen, and asserted further that they did not derive their rights from the king. The right of veto was freely admitted. The greatest disputes concerned the question of salaries. The purse was used as a means to control the governor. Land grants and the disposition of revenue were other sources of friction. Requests for an accounting and the exercise of the veto power led to frequent controversies.

F. Provincial control over suffrage and local government. The control of *suffrage* was in the hands of the legislature. At first there were no specific qualifications. The first Burgesses were elected by "inhabitants," probably freeholders. About 1650, suffrage was conferred on all freemen. By 1705 the members of the House of Burgesses were required to be freeholders. The suffrage law of 1762 established a freehold qualification for voters. This remained the law until 1829, when negroes, mulattoes, and Catholics were excluded. The control of *local government* was in the hands of the legislature. The statutes regulating local government followed closely the laws and customs of England. The student finds in Virginia, under the colonial system, a mirror of the English social and political system.

II. The constitutional organization of a proprietary colony (Pennsylvania).

A. The royal grant to William Penn. The land was given outright, but the government was not vested absolutely in the proprietor. The charter required him to gain the consent of the colonists, who were freemen. A representative assembly was provided for, thus safeguarding the rights of person and property, and guaranteeing the right of participation in the government.

B. Later plans of government. The different schemes of government issued in the name of the proprietor were in reality participated in by the people. The influence of popular opinion was extensive. Religious freedom was allowed, with the limitation that offices were open only to Christians. Provision was made for an assembly, composed of four persons from each county. The executive was the proprietor when present, and his deputy in case of his absence.

C. The representative system of the proprietary colony. Statutes controlled suffrage and elections. To vote or hold office, one must be a freeholder with fifty acres of land or with £50. The same requirements obtained in the city of Philadelphia. There was, under this system, one chamber of the legislature. A council was appointed by the governor which had no legislative power. Religious liberty was the distinguishing feature of the Pennsylvania system.

D. The proprietor and the legislature. The proprietor was dependent upon the legislature, as in other colonies, for grants of money. The practice of withholding the salary of the governor until desired legislation had been approved, was common.[1] The conflict between the governor and the legislature led to the eventual stripping of the governor's powers in Pennsylvania.

[1] Franklin, in discussing the practice of the Pennsylvania assembly of holding a bill awaiting signature in one hand, and the governor's salary in the other hand, observed: "Do not, my courteous reader, take pet at our proprietary constitution for these our bargain and sale proceedings in legislation. It is a happy country where justice and what was your own before can be had for ready money. It is another addition to the value of money and, of course, another spur to industry. Every land is not so blessed."

III. The constitutional organization of a corporate colony (Massachusetts).

A. The grant from the Crown to the Massachusetts Bay Company. The corporation was essentially a state in embryo. It was, in effect, a little government set up or authorized by the king. In the case of Massachusetts, the members of the corporation settled in America and became the direct government of the people and territory they controlled, with the voters as the stockholders, and the governor as the head of the corporation.

B. The transfer of the corporation to America. In Virginia, the members of the corporation remained in England, and transacted their business through agents. In the case of Massachusetts, it was virtually a transfer of the company and its members to the new world. It was incorporated by King Charles I in 1629 under the title: "The governor and company of the Massachusetts Bay in New England." It was but an incorporation of men drawn together by religious ties, with settlement as their object and not profit, as was the case in Virginia. It provided for a governor and deputy governor, and eighteen assistants chosen from the company, who were freemen. The governor and deputy were chosen by ten people of the company (freemen). All the freemen constituted a grand court with the right to elect officers, admit new members, and make laws. Within itself, the corporation was a democratic body, but was essentially a closed corporation.

C. Influence of religion. Religious influence was profound in Plymouth. The celebrated Mayflower Compact, an agreement written and signed, avowing a common purpose, and incorporating under a spirit of concession to and acquiescence in the common good, had much to do with the beginnings and growth of self-government in Plymouth until the charter of 1691 was issued.

D. Town government in Massachusetts. The unit of local administration in Massachusetts, as in New England generally, was the town. Its distinctive institution was the town-meeting, composed of qualified electors, which met as a legislative body to determine policies, select the officers of the town, levy taxes, appropriate money, pass ordinances, and

hold to account local officers. This institution was little changed by the Revolution.

E. The representative system. The elector for the member of the legislature, under the charter of 1691, was a freeholder of an estate worth forty shillings a year, or the owner of other property amounting in value to £40 sterling. The town was the unit of representation. Little effort was made to adjust representation to the population.

F. The charter of 1691 and conflicts with the Crown. The charter of 1691, unlike other charters, included the powers and organization of the legislature. The governor was appointed by the Crown and was regarded as the king's personal agent. He was both the representative of the British government in the colony, and the chief executive official of the colony. The governor had the usual executive powers, but there were important limitations. He could adjourn, prorogue and dissolve the assembly. He could not appoint the council or upper house. Civil officers were appointed by the governor only with the consent of the council. However, he organized the militia, commanded the armed forces, appointed the chief officers, and declared martial law in case of invasion or rebellion. Here was a division of authority suggesting a separation of powers, which made possible an early and effective resistance by Massachusetts of British control.

G. The Massachusetts' system compared with Rhode Island and Connecticut. In Rhode Island and Connecticut, the governor was elected annually by an assembly consisting of the governor, his assistants, and representatives chosen by the electors. In these states the governor was little more than a figurehead, and acted only in coöperation with his councilors.

READING

BRUCE. *Institutional History of Virginia.*
DOYLE. *Puritan Colonies,* Vol. I.
FISKE. *Old Virginia and Her Neighbors.*
MEREDITH. *Maryland as a Proprietary Colony.*
OSGOOD. *American Colonies in the Seventeenth Century,* Vol. I; Vol. II, Chap. II.
PALFREY. *History of New England,* Vols. I and II.
SHEPHERD. *History of Proprietary Government in Pennsylvania.*

CHAPTER III

CLASSES OF COLONIAL SOCIETY BASED UPON ECONOMIC STATUS, AND THEIR RELATION TO POLITICAL POWER

I. Main sources of immigration from Europe.

The chief *agencies* for colonization were the trading companies, the religious congregations, and the proprietor. The leading *peoples* were the English, representing all classes and settling for a multiplicity of reasons; Scotch-Irish, representing the small farmer and working classes and moved by religious and economic reasons; the Germans, chiefly farmers and artisans, driven to America by persecution and poverty; and the Huguenots and Jews, who sought religious freedom. The classes of immigrants were: the economically independent; indentured servants; involuntary servants; and slaves.

II. Economic classes in New England.

Henry Cabot Lodge has declared that settlers in New England were the country gentlemen, the small farmers, and the yeomanry of the mother country. Moreover, he declared that they were all men of property and good standing. Settlers in New England were almost exclusively of English stock. The manufacture of textiles, the iron industry, shipbuilding, fishing and ocean commerce in New England resulted in the rise of industrial and mercantile classes, and in the course of time, the professional class. It also led to a certain economic independence. Geographical and climatic conditions, combined with the unpopularity of rents, developed an independent class of small farmers in New England who insisted on owning the freehold, and opposed tenantry and servitude. The rôle of the small community was important, both socially and politically. Restrictions were placed on the right of suffrage by all New England colonies.

III. Economic classes in the Middle colonies.

The following classes formed the composite population of New York: 1. The Dutch and English aristocracy; 2. The

merchants of New York; 3. Small landed proprietors; 4. Small farmers and mechanics; 5. Indentured servants; 6. Slaves. In the main the Middle colonies were peopled by the English, the Scotch-Irish, and the Germans. The manors and proprietors of the Middle colonies maintained an economic and social hierarchy much like that of feudal times. This was especially true of the landed proprietors of New York. Indentured servants formed a large part of the population. The slave population was large in Delaware and Pennsylvania. *Suffrage* was generally limited to freeholders, except in Albany and New York, where it was limited to freemen. Catholics were excluded by law, as were the Jews. The vote in New York was from one-ninth to one-fourteenth of the population, and about one-eighth of the population was entitled to vote.

In Pennsylvania, the classes were: 1. Well-to-do Quakers, and the landed aristocracy; 2. Small farmers; 3. Mechanics and artisans; 4. Indentured servants. It is estimated that for the periods 1682–1708, 1708–1728, and 1728–1804, the indentured servants constituted respectively one-third, one-half, and two-thirds of the population. Of these the largest number were Dutch, and there were many Irish. Only freeholders or owners of personal property could vote. One must own 50 acres, with 12 acres cleared, or have £50 lawful money, in order to vote. The mechanics protested against this system during the Revolution, hence all qualifications were then swept away.

IV. Economic classes in the Southern colonies.

In Virginia the class system was clearly marked. The main classes were: 1. Planters; 2. The middle farming class, *i.e.*, smaller planters; 3. The yeomanry; 4. Indentured servants; 5. Slaves. The immigrants were chiefly English and Scotch-Irish. At the top of the social and financial hierarchy was the planter, who resembled the English landlord. With slavery and forms of servitude an essential and integral part of the economic system, there was much less ownership in fee of small farms, and a larger dependence upon England, both economically and culturally. The plantation was the center of community life, and the county, distinctly a rural area, was the unit of local government.

Suffrage in Virginia was regulated for fifty years by the law of 1762. To vote, one must be a freeholder to the amount

of fifty acres in the country, or own a lot in a town. The number of voters was larger than in the other colonies. There was a more general exercise of the right of suffrage than in the other colonies, even though it was not more democratic. The predominance of the planting aristocracy in matters of elections and government was maintained.

READING

BISHOP. *Colonial Elections.*
FISKE. *Beginnings of New England.*
GEISER. *Indentured Servitude in Pennsylvania.*
LODGE. *English Colonies in America.*
MCKINLEY. *The Suffrage Franchise in the Thirteen English Colonies.*

CHAPTER IV

GENERAL FEATURES OF BRITISH CONSTITUTIONAL CONTROL IN THE COLONIES

I. Veto.

Appeals were made to the king in council. Due to the activities of the merchants, the Board of Trade was created in May, 1696, although opposed by the Crown. The process follows: 1. Laws were first sent to the Board of Trade; 2. They were then sent to the law officer of the Crown, who passed upon their constitutionality. 3. The laws were then returned to the Board of Trade, which conducted hearings of the interested parties. 4. The merchants had regular representatives to appear before the board. 5. The laws were then sent to the Privy Council with recommendations. The power of veto was practically unlimited.

II. Appeals.

Even in the charters, where no provision was made for appeals, it was regarded as an inherent right to appeal from the colonial courts to the king in council. By act of Parliament, all laws and customs in the colonies in conflict with the laws of England, dealing with colonial affairs, were declared to be null and void. Moreover, it was enacted that the Crown and Parliament of Great Britain had the authority to pass laws binding the American colonies in every respect. In the case of *Winthrop v. Lechmere*,[1] the property of one Winthrop was divided equally among his children at death, under a law of Connecticut. An action was brought, and an appeal was made. The Connecticut law was held null and void by the Privy Council, "as being contrary to the laws of this realm, unreasonable, and against the tenor of their charter, and consequently the province had no power to make such a law."[2] Later, the Supreme Court of the United States assumed jurisdiction over cases involving state constitutional questions.

[1] Thayer, Cases on Constitutional Law, Vol. I, p. 34.
[2] *Ibid.*, p. 36.

This colonial experience explains in part the acquiescence by the people in the assumption by the courts of the power to invalidate laws on constitutional grounds.

III. Control of the monetary system by Parliament.

By act of Parliament of 1763, such colonial laws as authorized paper money or extended the life of outstanding bills, were declared void. Bills of credit were, in effect, forbidden to the colonies.

IV. Control by the governor over colonial legislatures.

The governor could in general dismiss members of the council, and could veto bills of the provincial legislatures.

V. Appointment of judicial officers.

This was the function of the governor, who could also constitute courts.

VI. Regulation of trade.

Foreign and inter-colonial trade was regulated by Parliament. A North Carolina law taxing peddlers was annulled on the grounds of restricting trade. Virginia was forbidden to close its ports to North Carolina. Indian trade was in theory regulated in behalf of the empire, but really in favor of the merchants. The British monopoly of colonial trade was fully in effect.

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CHAPTER V

AMERICAN POLITICAL THEORIES AND CONSTITUTIONAL DOCTRINES PRECEDING THE REVOLUTION

I. State papers illustrative of doctrines.

1. Colonial charters were first invoked as a source and guarantee of the rights of the colonists. These charters determined in general the constitutional organization of the various colonies, and fixed the relations of the grantees and the king. Little headway was made through reliance on these instruments. Then followed the protest literature of the Revolution.

2. *The New York Charter of Liberties* of 1683 includes the following: 1. A guarantee of a session of the general assembly once in three years. 2. Suffrage is granted freeholders. 3. No member of the legislature can be molested during the session, for legislative acts. 4. A bill of rights. 5. Due process of law is provided for. 6. Jury trial.

3. *The Stamp Act Congress of 1765.* The following principles were laid down in its declaration: 1. Claimed the rights of subjects born in England. 2. Against taxation without a voice in levying the tax. 3. Due to circumstances, the colonies could not be represented in the Parliament. 4. The representatives of the colonies should be selected by themselves. 5. No tax could be levied except by the colonial legislatures. 6. All grants to the Crown were free gifts. 7. Trial by jury regarded as an inherent right. 8. Right of petition regarded as an inherent right.

4. *The Massachusetts circular of 1768.* Under this circular these rights were claimed: 1. Parliament has no right to tax Americans without their consent. 2. Colonists, from the nature of the case, cannot be represented in Parliament. 3. People are not free who are subject to governors and judges appointed by the Crown and paid out of funds raised independently. 4. Other colonies should consider the common situation.

5. *The Virginia resolutions of 1769.* These resolutions asserted: 1. The sole right of levying taxes in Virginia is vested in the legislature. 2. The right of petition still remains. 3. The trial of colonists overseas was condemned. 4. A redress of grievances was sought.

6. The declaration and resolves of the First Continental Congress,[1] enforced by vigilance committees, were in a sense the forerunner of the Declaration of Independence, and the Revolution.

7. The Declaration of Independence,[2] and the doctrine of natural rights, formed the basis of the political thought of the Revolution. The ideas which it set forth furnished a justification for political separation, after every appeal to their rights as Englishmen had failed.

II. Doctrines held by leading Americans.

There was no revolutionary literature on the eve of the Revolution comparable to that of the French Revolution. Many colonists read the writings of John Locke, and due to this influence, shifted their defense from that of the rights of Englishmen to the claim of the natural rights of man. The American philosophy of government is found in the views of certain representative men. Otis rested his assertions on the ground of constitutionality, but as the conflict approached, he shifted to the theory of natural rights. Samuel Adams took the view that government was not founded on compact or force, but through necessity. John Adams thought that rights were derived from the legislator of the universe. Thomas Paine contended that legitimate authority sprang from the consent of the governed. He discarded the theory of the rights of British subjects and based his arguments on natural rights. Government, in his estimation, was produced by our wickedness. Alexander Hamilton did not regard the rights of the colonists as flowing from old parchments or documents adopted by them, but as flowing from man himself. In this manner the leaders deserted their doctrines based upon constitutional documents and seized upon the theory of natural rights.

[1] See Appendix, III.
[2] *Ibid.*, VI.

III. Rights sought by the Colonists.

The rights asked by the colonists, based upon the rights of Englishmen, were: 1. Participation in the government, and a negative control over the laws and decrees of Parliament. 2. A legislative assembly composed of local subdivisions, and elected by freeholders. 3. No taxes to be laid without the consent of the local legislature. 4. No one to be deprived of life or liberty without trial. 5. Indictment by a grand jury. 6. Fines should be in proportion to the offense. 7. Bail should be reasonable. 8. No one should be compelled to render public service except by law. 9. No property should be taken without due compensation. 10. There should be no quartering of soldiers. 11. No person professing the faith deemed essential by a particular colony should be molested.

IV. Relation to the Revolutionary doctrines of 1688.

The rights sought by the colonists were negative in character, and in the main were intended to guarantee individual rights. The colonists therefore took a negative rather than a positive view of the state, and consequently fell back upon the individualistic conception of the state. In framing a formal justification of the Revolution, however, the colonists adverted to the philosophy of natural rights. The whole people did not rise in support of this theory, and it is the opinion of some historians that the work of the Revolution was the work of a minority. Clearly the political instruments used to break down the claim of Great Britain — the committees of correspondence — were extra-legal, and in the course of time supplanted or assumed the authorities formerly exercised by loyal provincial and local government bodies. The philosophical justification of the American government, therefore, rests upon the doctrine of natural rights of man, and of the imprescriptible rights of Englishmen resulting from the Revolution of 1688.

V. Constitutional principles growing out of the conflict with Great Britain.

These main principles were: 1. Constitutional limitations. 2. The operation of theories and doctrines in their relation to actual government. 3 Natural rights. 4. Representative institutions. 5. Legislative supremacy. 6. Personal rights and liberties. 7. The primacy of the courts.

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CHAPTER VI

MODES OF CONTROL AND THE DEVELOPMENT OF INSTITUTIONS DURING THE REVOLUTION

I. Instruments of Revolutionary propaganda and government.

The legalistic view of the Revolution is not altogether justified by the facts. In some cases it was a group of revolutionists, rather than a group of states rising against the home government. The Committees of Correspondence were organs of propaganda in the first instance. The national committee or convention was an outgrowth of local committees.

Revolutionary procedure in a colony (New York). The various classes of society differed as to procedure. The merchant class favored active protest, but did not favor revolt. The lesser classes inclined toward radical action. Ten days after the Stamp Act Congress, the mechanic class organized the "Friends of Liberty" society, in answer to the protest of the merchants. Open violence on the part of this group was opposed by the merchants under the leadership of Robert R. Livingston. There were thus two classes, the merchants, who could afford to wait and who favored passive resistance, and the laboring class who could not wait for a constitutional redress of grievances. As a result, many were thrown out of work. In January, 1774, the "Sons of Liberty" held a meeting and passed a resolution against the use of stamped paper, and at the same time appointed an executive committee to carry into effect the resolution. Two legal systems, therefore, were opposed, the British, and that of the new state. The situation stood thus at the time of the repeal of the stamp act.

The conservatives, to escape from this position, called a meeting of 27 conservatives and 23 radicals. Unable to agree, the meeting adjourned. They met again, after an appeal for harmony, with 27 conservatives and 24 radicals present. The conservatives voted down a non-importation act, and were in control when the news came from Boston that a Con-

tinental congress would be held. The manner of electing delegates arose. The mechanics desired manhood suffrage, but the conservatives objected. It was agreed that the committee should nominate, and a compromise was arranged in the selection of delegates. This procedure was followed more or less in all the colonies.

The First Continental Congress of 1774, was extra-legal. Delegates were chosen by irregular revolutionary agencies, varying in the different colonies. In Massachusetts, they were chosen by town committees; in Connecticut by the committee of correspondence; in New York, as described above; in New Jersey, by committees appointed by the several counties; in Delaware, by the freemen of the counties; in Virginia, by county committees; in South Carolina, by a general meeting of the people; in North Carolina, by a general meeting of the deputies of the counties. The first Continental Congress did much to establish the new state. It passed a non-importation act; provided for the election of committees of enforcement by those qualified to vote for members of the legislature; and imposed a test of loyalty. The enforcement committee carried the laws into effect. A civil war resulted, as well as a revolution.

The Second Continental Congress of 1775 was constituted in much the same way. It assumed authority, and performed all the acts of a sovereign body. Its chief functions were the organization of the government of the United States; the prosecution of the war; its exercise of sovereign powers; and its contribution toward union.

Evolution of revolutionary instruments within a state. New York may be taken as an example. The last colonial assembly was held in 1769. This was a legal body. It held sessions from time to time until April, 1775. In January, 1775, a vote was taken on the activities of the Continental Congress. The same group passed from a legal body through a revolutionary body, to a new legal body. The committee of fifty-one was contemporary and parallel with the provincial assembly. The first provincial congress was held in 1775 as a successor to the provincial assembly; the second in the same year; the third in 1776; and the fourth in the same year, which drafted the Constitution of 1777 and put it into effect without popular ratification. Of this fourth Congress, 23 members had been in all the previous congresses, and only

six of the entire 107 members were without experience in a revolutionary body. The Constitution of 1777 was drafted by one-third of this extra-legal body. In January, 1778, the government set up by this Congress became the government of the state.

II. Jefferson's plan of a Constitution in 1776.

It embraced the following points: 1. One branch of the legislature (the lower) to be elected by popular vote, only freeholders and taxpayers voting. 2. Representation should be apportioned according to the number of electors. 3. The Senate or upper house to be elected by the lower house, and one-third to retire every three years. 4. The administrator to be appointed by the legislature. 5. The council to be appointed by the legislature. 6. Judges to be appointed by the administrator and council. The legislature only rested upon the will of the people under this plan, which shows the assumption of power by the legislature.

III. Changes made by the first state constitutions.

The significant changes of the first state constitutions were:

A. The destruction of executive power. Except in Massachusetts and New York the executive became a mere figurehead. In these states he was elected by the people. His term of office was reduced to one year or a trifle more. The Governor, having embodied the authority of the Crown, was stripped of this power under the first state constitutions.

B. Substitution of an elective body for the old council. In many states this became the Senate, the smaller and upper house. In Georgia, there was only one house.

C. The judiciary. The courts were made responsible to some popular organ of government. The popular election of judges is a nineteenth century development.

D. Qualifications of officers. The governor was generally required to possess considerable property. The same was true of members of the legislature. In some cases it was required that legislators should be Protestants.

E. Suffrage. In Massachusetts, one must have capital yielding an annual value of £3, or a freehold of £60. In New York, voters for the governor and senators had to have a freehold worth £100; voters for other officers, freeholders of £20.

In cities, freemen paying taxes could vote. The reduction of suffrage requirements in New York was due to the conflict between the mechanics and the conservatives. In Virginia there was no change. In South Carolina, free white men owning a freehold of fifty acres and believing in a future state of rewards and punishments could vote.

IV. Control under the Articles of Confederation and imperial control.

Under the Articles there was no appeal to a higher court or other power, as under imperial control. Taxation, while levied with the implied consent of the people, was mainly in the form of requisitions. Safeguards and limitations against the legislatures, so plentiful under the imperial régime, were swept away.

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CHAPTER VII

THE GOVERNMENT UNDER THE ARTICLES OF CONFEDERATION

I. Organization of the government under the Articles.

A. The Congress. The Congress was to consist of not less than two nor more than seven delegates from each state. The vote was by states, *i.e.*, each state was entitled to one vote. The states had the right to recall their delegates.

B. The executive. There was no arrangement for a permanent executive. A committee of one delegate from each state was provided for, with power to act when the Congress was not in session.

C. The courts. No arrangement was made for judicial power except in admiralty.

II. Limitations upon the states.

The power to make treaties and to declare war was given to the Congress. It was provided that no change could be made in the Articles except with the consent of Congress and the ratification of the state legislatures. Each state retained its "sovereignty, freedom and independence, and every power, jurisdiction and right" not expressly granted to the United States.

III. Economic and financial conditions under the Articles.

A. As to raising revenues. This was to be by a system of requisitions on the states in proportion to the value of their lands. This system was not adapted to raising revenues, building a navy, raising an army, regulating commerce, discharging public debts, and other acts of government essential to a sovereign state. Even the soldiers could not be paid. They disbanded after the war, only to be paid in scrip. Officers formed an organization known as the "Society of the Cincinnati." One of their objects was to obtain their pay. The officers, holding large quantities of this paper money, with no redemption in sight, sought a stronger government

which could pay. The privates had disposed of their paper at reduced prices.

B. As to the discharge of debts due the British. The legislatures of the Southern states had tried either to wipe out the debts owed to British merchants, or to postpone payment. The Northern states favored some method of compelling the Southern states to pay, because the British would not give up possession of the Northwestern ports until the debts were paid, thus depriving the North of the fur trade. American merchants were denied credit in London until the debts were paid. The North, therefore, favored a government providing that suits should be instituted in independent courts. The South also owed money to the North. After the war, the colonies were in a worse condition with respect to trade than before. In 1783 an Order in Council required that all trade should be in British ships. Trade with the West Indies was cut off. Under the Articles, England was able to play one state against another. John Adams sought concessions from the British Foreign Office, but England refused, knowing that the United States had nothing to offer in return.

The early trade of the New Englanders with the west coast and the Orient was practically ruined.

C. As to the fiscal system. The monetary system was in a disordered condition. Foreign coins prevailed almost exclusively. Pennies were coined in Connecticut. A traveler, changing an English pound, might expect change in several different kinds of coins. There were many clippers and counterfeiters, even the government clipping its coins. Specie was scarce, and was more so at the close of the war. British demands of payment in specie drained the country still further.

The collection of debts. During the war, debts were suspended. The debts of soldiers were suspended by joining the army. After the war, pressure was brought to bear against the debtors. There were many lawsuits. In the city of Worcester there were 2000 foreclosures in one year. This caused a great cry for more paper money.

Action of the states to meet this demand. Seven of the thirteen states issued paper money unsupported by specie. Pennsylvania began to issue bills of credit in 1785, which soon fell to 88. In North Carolina, paper money fell to 70. There was depreciation in South Carolina and Georgia. In New

York the shopkeepers and artisans demanded paper money, which was issued in 1786. In Rhode Island, paper money was issued on farm values. The commission was liberal in evaluating property, and large amounts of money were issued. Depressions set in, leading to action by the courts. Due to the decision in the case of *Trevett v. Wheeden,*[1] the judges were brought before the legislature, but were not dismissed. This was one of the first great cases where a court declared an act of the legislature unconstitutional.

Action of the government of the Confederation. This government issued paper money, also. The issue varied from six millions in 1775 to 140 millions in 1779. In 1780, the value of the dollar had been reduced to two cents.

The great public debt. This amounted to about seventy millions of dollars. Ten millions was held abroad. Much of this paper had been obtained by the citizens. There was no money to meet interest payments. The arrears in the domestic debt increased from $3,100,000 to $11,400,000, and the foreign debt from $67,000 to $1,640,000, from 1784 to 1789. The creditors, therefore, were not getting their interest. The debt of seventy millions comprised one-fifth the value of all the lands in the country, and about equal to the rest of the wealth of the country, *i.e.,* personal property.

Demands for a change. The merchants and creditors wanted a government with power to regulate money matters. This was also true of the speculators. In the West, certificates sold for as little as eight cents on the dollar. This paper had passed from the hands of small holders to speculators, especially in the South. This class, ordinarily conservative, was most active in securing a change in government. The change was also supported by the many *bona fide* holders of government securities. Leading men, as Washington, Hamilton, King, and Morris, favored the change on the grounds of sound fiscal policy. These demands found concrete expression in the newspapers and in letters.

IV. Resistance to creditors in collecting debts and in staying the issue of paper money — Shays' rebellion.

There was a struggle over debts and paper money in all states issuing it, but only in Massachusetts did it lead to civil war. In this state the private debts amounted to £300,000.

[1] Varnum, James M., The case of Trevett against Wheeden (1787).

The state owed a huge debt, especially to its soldiers and for the war. Specie was drawn from the state by purchases and payments abroad. One Daniel Shays, a captain during the Revolution, organized a movement to resist the state government. Their grievances were: increased cost of legal proceedings charged by the lawyers; heavy taxes; the refusal of the legislature to issue paper money; the foreclosure of mortgages by creditors against farmers heavily in debt; and the scheme of representation in the state Senate, based upon the amount of taxes paid. The revolt spread through the state, but was finally quelled.

Shays' rebellion, while a protest against the action of creditors and the state government, demonstrated clearly the necessity of intervention on the part of the national government to aid a state government when violence was set in motion beyond the control of the state government. Washington commented thus on Shays' rebellion: "What, gracious God, is man that there should be such inconsistency and perfidiousness in his conduct! It was but the other day that we were shedding our blood to obtain the constitutions under which we now live — constitutions of our own choice and making — and now we are unsheathing our sword to overturn them."

V. Attempts to amend the Articles.

In 1781, the Continental Congress adopted a proposition authorizing the levy of five per cent on imports, but this measure was rejected by the states. In 1783, the Congress proposed an amendment authorizing a tax on imports to be collected by state officials and applied on the public debt. This measure failed, also. In 1786, a special appeal was made to the states, pointing out their neglect in paying their quotas and the resultant impairment of the credit of the United States. In the opinion of the Congress it was no longer honorable to look to this source for meeting the public debt.

VI. Summary of objections to the Articles, growing out of the experience of the government under them.

The defects of the Articles of Confederation were:

1. The lack of an executive; 2. the failure of the Articles to provide a judicial system; 3. the inability of the state gov-

ernments to pay the public debt, both interest and principal; 4. the lack of effective control of interstate and foreign commerce; 5. inability of the government to enforce treaties with foreign governments; 6. the inability of the government to collect taxes; 7. the complete reliance by the government of the Confederation on the state governments to enforce its laws; 8. the lack of power of the Congress and the national authorities to act directly against an individual in the enforcement of laws; 9. the need of national aid for a state government when threatened with violence beyond its control; and 10. the neglect of population altogether as a basis for representation under the Articles of Confederation.

VII. The movement toward a "more perfect union."

Statesmen of the Revolutionary period with great experience in war, diplomacy, and administration, naturally favoring highly centralized executive authority, urged a reorganization of the government. This school of statesmen started a conflict which persisted subsequently in dealing with questions of construction and interpretation. Hamilton, in 1780, suggested a convention for the purpose of writing a new constitution based on the political and administrative principles of the school to which he belonged. General Washington sent a circular letter to the governors of the states, pointing out that the Union could not survive unless a supreme power was established "to regulate and govern the general concerns of the confederated republic."

Certain of the state legislatures urged a revision of the Articles. The governor of Massachusetts in 1785 secured legislative approval of a call for a general convention to increase national authority. The effective call came from the Virginia legislature which asked that delegates from the states meet at Annapolis in 1786 to discuss the problems of commerce and taxation.

The Annapolis convention. Five states alone were represented. The degree of dissatisfaction could not be measured by this seeming indifference. Upon motion of Alexander Hamilton of New York, a resolution was adopted, recommending the Congress to ask the states to send delegates to Philadelphia the next year for the purpose of considering the Articles and suggesting such changes as would make the instrument meet the needs of the Union.

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CHAPTER VIII

THE NATIONAL CONVENTION HELD AT PHILADELPHIA IN 1787

I. The congressional resolution of February, 1787, calling the Convention.

The resolution of call stipulated that the convention should be held for "the sole and express purpose of revising the Articles of Confederation." Moreover, changes and additional provisions which, in the judgment of the convention, were required to render the Articles more adequate to the strengthening and preservation of the Union, should be referred to the Congress for agreement, and to the states for confirmation.

All states but Rhode Island responded to the call. This state feared the loss of its control of commerce.

II. The delegates to the Convention.

Of the sixty-five delegates elected, fifty-five attended the convention. From the standpoint of *political experience* and *patriotic services*, there was practically complete representation. Political theory was represented by James Madison, the "father of the Constitution"; law, in James Wilson and Alexander Hamilton; finance, in Hamilton and Robert Morris; diplomacy, in Franklin; war and administration, in George Washington. Dickinson, Johnson and Rutledge had served in the Stamp Act Congress. Read, Sherman, Wythe, Gerry, Franklin, Morris, Clymer and Wilson had signed the Declaration of Independence. All but twelve had seen service in the Continental Congress. Washington, Hamilton, Mifflin, and Charles Pinckney had been officers during the Revolution. Seven had been governors of states. Many had had experience in colonial and state politics and administration. Potentially, many were yet to reach the prized places in state and national governments. Thomas Jefferson, Samuel Adams, Thomas Paine, and Patrick Henry were not in attendance. Benjamin Franklin, having probably the most varied political and dip-

lomatic experience of all, was the only delegate and the only American claiming the distinction of having helped to frame and having signed the four great documents and state papers of the Revolutionary and reconstruction periods: the Declaration of Independence; the treaties of alliance and commerce with France in 1778; the treaty of peace with Great Britain, 1783; and, the Constitution of the United States.

From the standpoint of *profession* or *occupation,* there were 33 lawyers, 8 men in business, 6 planters, 1 educator, 1 physician, 2 men engaged in the public service, and 3 without any special occupation. The representation of *economic interests* was as follows: 40 holders of public securities (depreciated treasury bonds), 24 capitalists, 15 slave owners, 14 dealers in speculative real estate, and 11 manufacturers and commercial men. A majority were graduates of colleges. "Never in the history of political assemblies has there been brought together so much sheer intellectual ability." The proof of this statement is found in the duration of their product.

III. The credentials of delegates, and their powers under their instructions.

The credentials of the delegates varied somewhat according to the states, but in general the instructions, in accord with the resolution of Congress calling and authorizing the Convention, called only for a revision of the Articles. The Massachusetts delegation was instructed only to revise the Articles. New Hampshire instructed that the defects be remedied, and that a report to Congress be made for confirmation by the states. Connecticut limited the delegates to changes and provisions agreeable to the general principles of republican government. New Jersey asked that the delegates take into consideration the state of the Union with respect to trade and related questions, and to take steps to make the Constitution adequate. Pennsylvania authorized its delegation to deliberate and to render the Constitution fully adequate to the exigencies of the Union. The Delaware instructions resembled closely the resolution of Congress. Virginia wanted the delegates to secure the great objects for which the Union was founded. Maryland desired a revision of the system of government. North Carolina sought to remedy the defects of the Union. South Carolina instructed the discussion of alterations which would render the government fully adequate. Georgia

sought also to make the fundamental law an adequate instrument.

IV. Organization and procedure of the national convention.

Washington was chosen to preside, Franklin having withdrawn in his favor. A Secretary was chosen to report the proceedings and the action of the Convention. Balloting arrangements were simple. It was decided that seven states should constitute a quorum, that a majority vote of the states would be required to decide all question, and that each state should have one vote. By-laws and rules of procedure were decided by the Convention itself. Meetings were held behind closed doors, and the proceedings were secret, in order that there might be the frankest discussion possible of the problems facing the convention.

The opening session of the Federal Convention is thus described in the *Journal:* [1]

In foederal-Convention.

On Monday the 14th of May. A.D. 1787. and in the eleventh year of the independence of the United States of America, at the State-House in the city of Philadelphia — in virtue of appointments from their respective States, sundry Deputies to the foederal-Convention appeared — but, a majority of the States not being represented, the Members present adjourned from day to day until friday the 25th of the said month, when, in virtue of the said appointments appeared from the States of (names omitted) . . .

In foederal-Convention Friday May 25. 1787.

It was moved by the honorable Robert Morris Esquire, One of the Deputies from Pennsylvania, that a President be elected by ballot, which was agreed to — and thereupon he nominated, on the part of the said State,

His Excellency George Washington Esquire

The Members then proceeded to ballot on behalf of their respective States — and, the ballots being taken, it appeared that the said George Washington was unanimously elected — and he was conducted to the chair by

The honorable Robert Morris, and John Rutlidge Esquires. The President then proposed to the House that they should proceed to the election of a Secretary — and, the ballots being taken, it appeared that

William Jackson Esquire was elected.

The following credentials were produced and read — (the credentials of the delegates do not appear in the *Journal*). . . .

[1] Farrand, Records of the Federal Convention I, 1–2.

The House then appointed Nicholas Weaver Messenger, and Joseph Fry Door-Keeper.

On motion of Mr. C. Pinckney — ordered that a Committee be appointed to draw up rules to be observed as the standing Orders of the Convention — and to report the same to the House. — A Committee by ballot was appointed of

Mr. Wythe, Mr. Hamilton, and Mr. Pinckney.

And then the House adjourned 'till monday next at 10 o'clock A. M.

Stages in the development of the Constitution. The deliberations of the Convention may be divided conveniently into the following periods:

A. May 14–June 13, Committee of the Whole, the Randolph Plan.

B. June 14–19, the Paterson Plan and the Hamilton Plan.

C. June 19–July 26, debate on Randolph Plan resumed. Committee of Detail appointed July 24. Resolution of Committee of Detail referred on July 26.

D. August 6–September 10, debate on the plan of the Committee of Detail. Appointment of the Committee of Style.

E. September 12–17, debate of the plan of the Committee of Style.

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ROWLAND. *George Mason.*

CHAPTER IX

THE PLANS FOR THE ORGANIZATION OF A GOVERNMENT

I. The Peletiah Webster claim.

The claim has been made that as early as 1781 Peletiah Webster had proposed a plan for a new fundamental law. In 1791, Webster declared that the Convention had taken his plans and had qualified them. He was only one of many who were thinking over a plan of government for the United States to supersede the Articles.

II. The Randolph or Virginia resolutions.[1]

This plan embraced the following points:

A. The rights of suffrage should be in proportion to the number of free inhabitants or their quota of contributions.

B. The national legislature should consist of two branches. It was more to provide checks and balances than to provide for equality of representation. The members of the lower branch were to be chosen by the people. The lower house should elect members of the upper house from a list of persons nominated by the state legislatures.

C. The national executive should be chosen by the national legislature, and should be ineligible for election the second time.

D. A national judiciary should be chosen by the national legislature and with a limited jurisdiction, as the right to try cases of impeachment and to try suits to which foreigners should be parties.

E. The powers of the Congress were to be very broad, and not enumerated or delegated powers. The right to legislate would extend to all cases where the states would be incompetent, or where the general interest would demand. This

[1] See Appendix, IX.

plan, coming from Virginia, was much stronger than the one adopted.

F. The Congress should be invested with veto power over acts of the state legislatures, and should call out the militia against the states to compel obedience.

G. The executive and a convenient number of the judiciary should constitute a Council of Revision to consider an act before it should go into effect. This was to be a check on the legislature.

H. Amendments to the instrument were to be submitted to the states for ratification.

I. The provisions of the "Articles of Union" were to be binding upon and enforced by officials of the states.

III. The Charles Pinckney plan.[2]

On May 29, Pinckney presented a plan which was submitted to the Committee of the Whole. Nothing more was heard of it until it was submitted to the Committee of Detail in July. It was not debated, but went to this committee and disappeared. There has been much conjecture as to the effect of this plan. In 1818, John Quincy Adams wrote Pinckney, asking for his plan. In his letter of transmittal, Pinckney observed that his plan was substantially the one adopted by the Convention. Such men as Madison and King were of the opinion that the plan described by Pinckney was not what was submitted to the Convention. The claim of investigators is that Pinckney's claim is not valid. Moreover, his plan contains provisions which were arrived at as compromises after long debate. The Pinckney plan has been reconstructed from the Wilson papers.

IV. The Paterson or New Jersey scheme.[3]

This plan contains certain fundamental principles, but was designed to save the Articles of Confederation. Its leading features were:

A. A proposed revision of the Articles of Confederation.

[2] See Appendix, XI.
[3] See Appendix, X.

B. An increase in the powers of Congress to include the regulation of trade, the issuing and collection of requisitions, and the taxing of imports.

C. The establishment of a plural executive.

D. A judiciary to be appointed by the executive.

E. Treaties and acts of Congress were to be the supreme law of the land, the acts of the state legislatures to the contrary notwithstanding.

F. Provision was made for the extradition of criminals, the admission of new states, and the enactment of uniform naturalization laws.

V. Hamilton's draft.[4]

The design of Alexander Hamilton embraced the following salient points:

A. Universal manhood suffrage.

B. The lower house to be elected by all free male citizens.

C. The senators were to be chosen for life by electors chosen by the voters. A land qualification was to be required of the electors.

D. The executive was to be chosen for life by electors.

E. Federal judges were to be appointed and to hold office during good behavior.

F. The governors of the states were to be appointed by the national government.

G. Congress should have the power to pass all laws for the common defense and for the general welfare.

Under this plan, Hamilton hoped to neutralize the powers of the voters and the lower house, and to provide the form of a democracy without the dangers which attend popular institutions of government.

READING

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FARRAND. *Records of the Convention,* Vol. III, Appendices C–F.
——. *The Framing of the Constitution.*

[4] *Ibid.,* XII.

CHAPTER X

THE CONSTITUTIONAL CONVENTION AND ITS RELATION TO THE PRINCIPLES OF DEMOCRACY

I. The fear of majority rule, and means proposed to check it.

To the Fathers, democracy meant the rule by the masses, unchecked and unrestrained. They were afraid of democracy. Clearly, they were on the lookout for means to check majority rule. It was discussed whether or not any part of the Congress should be elected by the people. Roger Sherman was opposed to direct participation by the people. Gerry also feared the people. Madison went into the problem of democracy more fully, and favored the election of the lower house by the people to break down the power of the state legislature. Gouverneur Morris regarded the Senate as a check. For this body he favored a propertied interest and an aristocratic spirit. It should also have something of an independent status. He believed thoroughly in the consolidation of the interests of the rich and poor as separate interests, to provide a check upon one another. One should be set up against another. If the rich mingled with the poor, in his opinion the poor would rule. He was against proportional representation in relation to population, but favored it as regards property. To Morris, therefore, property was the main interest of government.

In the minds of these men, majority rule meant the rule of the propertied class by the propertyless class. It would mean, to them, a continued conflict between the two, unless checked by fundamental law. The following remedies for this condition were proposed:

A. That the people should have as little part in the government as possible, without serious dissatisfaction. This did not mean that the people should have no part in the government.

B. That the upper works or mechanism of the government should be so constructed as to refine the crude proceedings of the lower branches. A property qualification and an indirect system of elections were therefore proposed for the upper house.

Wilson, of Pennsylvania, favored the popular election of the Senate. Pinckney, of South Carolina, favored the popular election of one house, because in his opinion equality was a fundamental condition in a democracy, where the distribution was so widespread, and would be increasingly more so.

II. Should there be established a direct or a representative system of government?

To the Fathers, direct government meant such government as existed in Rome and the Greek City States. Of all kinds, direct government was the most odious to the framers of the Constitution. They saw a remedy to the problem in representative government. In support of this, Madison expressed a purely materialistic view of politics. To him, the first object of government was to protect the exercise of faculties for acquiring property. The starting point is the differences in faculties; therefore there arise differences in amounts and kinds of property. These produce views and sentiments. From this condition parties arise. The source of factions is the unequal distribution of property. The causes of factions cannot be removed; hence the necessity for controlling them. Madison declared that the object to which their endeavors were directed was how to prevent majority rule and to preserve the spirit and form of popular government. Representative, as opposed to direct government, was the answer.

III. Plans to limit the suffrage and their abandonment.

The Virginia plan proposed the election of the lower house by the people. Roger Sherman remarked that the people should have as little to do as possible with the government. Popular elections were suggested by Mason and Madison, with the thought that states rights might be broken down in this way. By a vote of 6 to 2, popular election of one branch was carried. It went to the Committee of Detail, which reported the provision now in the Constitution.

No qualifications were placed on suffrage, but much discussion preceded this decision. Morris favored limiting the suffrage to freeholders. Wilson, of Pennsylvania, pointed out that the variety of qualifications in the states was a burden. In the opinion of Ellsworth, it should be left to the states, since their ratification of the instrument had to be secured. Dickinson favored a freehold qualification. Failing

to agree, the regulation of suffrage was left to the states by a vote of 7 to 1.

IV. Should officers of the government have a monied qualification?

In the opinion of Charles Pinckney, officers should not be popularly elected. Moreover, he proposed a $100,000 qualification for President and $50,000 for members of the Supreme Court.

V. Should there be a "national" or a "federal" government?

The system intended by the framers led to a long political contest. Did they propose to leave the states free and independent, or to give the status of sovereignty and independence to the Union? There was clearly a difference between the desires of the Convention and of the ratifying authorities. It was, in effect, the question of sovereignty, and whether it was located in the state or in the nation. This question did not receive the most careful attention owing to its abstract character. The members were interested in practical questions of national defense, taxation, and the economic situation. Questions of abstract politics rarely find a place in convention discussions. According to Madison, sovereignty could not be defined. No one knew what it was. All that exists is a concrete manifestation of power which may be here today and there tomorrow. He claimed that power was divisible.

It is a fair assumption that the voters intended to approve a Constitution retaining the sovereignty of the states. The result was really a system from which it was impossible to withdraw. The majority of the Convention thought they were making a system from which a state could not withdraw. The great majority of ratifiers intended quite another thing. To Madison, it was a mixed system, and ratification was federal and not national; the House national; the Senate federal; the executive a compound of both; the Constitution in its operation was national and not federal, because it deals with individuals and not states; in the extent of its powers it is federal and not national, because its powers are enumerated; and the amendment section was a compound.

The question of the nature of the instrument was discussed

in the Convention, not as a philosophy of government, but as a working arrangement. On May 30, 1787, a resolution was passed declaring that a national government should be established. Connecticut was opposed to this. The New York delegation was divided on the question.

It has been pointed out by certain authorities that this was amended by striking out "national" and inserting the "United States." Luther Martin declared that this was done because it might create alarm.

Lansing, of New York, stated that if New York had known a national government would be created, no delegates would have appeared. Gouverneur Morris said that he went to the Convention not as the representative of any particular section but as the representative of America, and, in a sense, of the human race. General Pinckney declared we needed a national government, leaving as much power as possible to the states.

Luther Martin pointed out that there were three parties in the Convention: 1. Those who wanted to abolish state lines. 2. Those truly federal and republican. 3. Those representing the large states, wanting to gain particular powers over the other states. These groups represented, respectively, the following classes: the nationalists, the federalists, and those inclined toward imperialism. The first and third groups combined, he said, and formed a national as opposed to a federal government, "designed not to protect and preserve, but to abolish and annihilate the state governments." He therefore withdrew from the Convention and opposed the ratification of the instrument.

The number of voters participating in ratification was about 150,000. In the act of ratification, group interests clearly controlled, and brought it about. The considerations of defense and commerce were uppermost. A referendum on the question of nationalism might have resulted in its defeat.

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SMITH, J. A. *Spirit of American Government.*

CHAPTER XI

THE EXECUTIVE DEPARTMENT UNDER THE CONSTITUTION

I. The executive under the Articles.

Here the executive, as such, was practically non-existent. Much of what is regarded as executive power was conferred upon the Congress. In this field, the Convention had practically a free hand.

II. The form of the executive.

The Convention was definitely against monarchy as such. John Adams feared that the executive might in the course of time become a monarch. Dickinson, while personally favoring monarchy, admitted the impossibility of its application to the United States, on the ground that the states would not ratify such a provision.

The veto power in the Randolph plan was in the hands of a Council. Randolph was thinking of a plural executive. Hamilton was in favor of a President who would serve during good behavior. Writing in the *Federalist,* Hamilton declared that *unity* and *energy* were the requisites of an effective executive.

The idea of the executive council was that there should be three members — one from New England, one from the South, and one from the middle section. Against this scheme, it was contended that the South and Central states would control to the disadvantage of New England, and that a plural executive would result in inefficiency.

The plan of a plural executive council was abandoned, only seven states voting for the single executive.

III. The method of election.

The following plans were proposed to the Convention:

1. Election by the legislature.
2. Election by electors chosen by the state legislatures.
3. Election by popular vote.

4. Election by electors chosen by popular vote.

5. Nomination by popular vote and election by the legislature.

6. Election by electors chosen by the state executive.

7. Election by a committee of 15 of the legislature chosen by lot.

8. Proposal by Richard Spaight of North Carolina that all the electors meet at the National Capitol and elect directly.

The suggestion of Hamilton was that the people in all the communities should vote for a larger number of electors; several thousand of these should get together and elect a smaller number of electors; and the smaller group should meet to elect the President of the United States.

Opposed to the electoral scheme, was the plan to allow Congress to elect the President. It was decided at first to adopt this plan. Shortly this action was reconsidered, and a majority of the Convention voted against it. A return was made to the Congressional method of election. To bring the matter to a conclusion, a motion for the appointment of a committee on the method of electing a President prevailed. The report of the committee was made on September 4, 1787, when the electoral system was adopted, with nine states favoring and two opposing the plan.

The system adopted was the result of a compromise between the large and small states. Election by the legislature and likewise by the people was feared by all; hence the electoral plan.

IV. The problem of departmental organization.

Mason suggested that the so-called Cabinet should consist of six persons, two each from the following regions: New England, the South, and the Central States.

The Constitution made provision only for heads of departments. The President is given the power to consult heads of the executive departments as to questions arising in their respective departments. Moreover, control of the Cabinet is further vested in the President, who is charged generally with the exercise of executive power, and in the Congress, which has the right to take the necessary measures to carry out the powers vested by the Constitution in the government.

V. The term of office.

The members of the Convention were of the opinion that the executive should have sufficient time in office to secure results from his administration, and to allow his policies to bear fruit. In addition to *unity*, which meant one executive, and *energy*, which meant an amplitude of powers, a definite tenure of office was required. Seven years was voted as the term of office. Later it was reconsidered, and a four-year term was agreed to. It was agreed that nothing should be said about reëlection in the Constitution.

VI. Constitutional qualifications of the President.

The President must be a natural-born citizen of the United States, thirty-five years of age, and must have resided within the United States for fourteen years.

VII. Federal Convention debates on the executive.

On June 1, 1787, the Convention gave itself to a consideration of the executive department. Says Madison's notes:

The committee of the whole proceeded to Resolution 7, 'that a National Executive be instituted, to be chosen by the National Legislature,' etc. . . .

Mr. PINCKNEY was for a vigorous Executive but was afraid the executive powers of the existing Congress might extend to peace and war, etc., which would render the Executive a monarchy of the worst kind, to wit, an elective one.

Mr. WILSON moved that the Executive consist of a single person. Mr. C. PINCKNEY seconded the motion, so as to read 'that a National Executive, to consist of a single person, be instituted.'

A considerable pause ensuing, and the chairman asking if he should put the question, Dr. FRANKLIN observed that it was a point of great importance, and wished that the gentlemen would deliver their sentiments on it before the question was put.

Mr. RUTLEDGE [S. C.] animadverted on the shyness of gentlemen on this and other subjects. He said it looked as if they supposed themselves precluded by having frankly disclosed their opinions from afterwards changing them, which he did not take to be at all the case. He said he was for vesting the Executive Power in a single person, tho' he was not for giving him the power of war and peace. A single man would feel the greatest responsibility and administer the public affairs best.

Mr. SHERMAN said he considered the executive magistracy as nothing more than an institution for carrying the will of the Legislature into effect, that the person or persons ought to be appointed by and accountable to the Legislature only, which was the repository of the supreme will of the society. As they were the best judges

of the business which ought to be done by the executive department, and consequently of the number necessary from time to time for doing it, he wished the number might not be fixed, but that the legislature should be at liberty to appoint one or more as experience might dictate.

Mr. WILSON preferred a single magistrate, as giving most energy, dispatch, and responsibility to the office. He did not consider the prerogatives of the British monarch as a proper guide in defining the executive powers. Some of these prerogatives were of a legislative nature. Among others, that of war and peace, etc. The only powers he considered strictly executive were those of executing the laws and appointing officers, not appertaining to and appointed by the Legislature.

Mr. GERRY favored the policy of annexing a Council to the executive, in order to give weight and inspire confidence.

Mr. RANDOLPH strenuously opposed a unity in the executive magistracy. He regarded it as the fetus of monarchy. We had he said no motive to be governed by the British government as our prototpye. He did not mean, however, to throw censure on that excellent fabric. If we were in a situation to copy it, he did not know that he should be opposed to it; but the fixed genius of the people of America required a different form of government. He could not see why the great requisites for the executive department, vigor, dispatch, and responsibility, could not be found in three men, as well as in one man. The Executive ought to be independent. It ought, therefore, in order to support its independence to consist of more than one.

Mr. WILSON said that unity in the Executive, instead of being the fetus of monarchy, would be the best safeguard against tyranny. He repeated that he was not governed by the British model, which was inapplicable to the situation of this country; the extent of which was so great, and the manners so republican, that nothing but a great confederated republic would do for it.

Mr. Wilson's motion for a single magistrate was postponed by common consent, the committee seeming unprepared for any decision on it; and the first part of the clause agreed to, viz., 'that a National Executive be instituted.'

Mr. MADISON thought it would be proper, before a choice should be made between a unity and a plurality in the Executive, to fix the extent of the executive authority; that as certain powers were in their nature executive, and must be given to that department whether administered by one or more persons, a definition of their extent would assist the judgment in determining how far they might be safely entrusted to a single officer. He accordingly moved that so much of the clause before the committee as related to the powers of the Executive should be struck out, and that after the words 'that a National Executive ought to be instituted' there be inserted the words following, viz., 'with power to carry into effect the national laws, to appoint the offices in cases not otherwise provided for, [and to execute such other powers not Legislative nor Judiciary

in their nature, as may from time to time be delegated by the national Legislature.] '[1] . . .

The next clause in Resolution 7, relating to the mode of appointing, and the duration of, the Executive, being under consideration,

Mr. WILSON said he was almost unwilling to declare the mode which he wished to take place, being apprehensive that it might appear chimerical. He would say, however, at least that in theory he was for an election by the people. Experience, particularly in New York and Massachusetts, shewed that an election of the first magistrate by the people at large, was both a convenient and successful mode. The objects of choice in such cases must be persons whose merits have general notoriety.

Mr. SHERMAN was for the appointment by the Legislature, and for making him absolutely dependent on that body, as it was the will of that which was to be executed. An independence of the Executive on the Supreme Legislature was in his opinion the very essence of tyranny, if there was any such thing.

Mr. WILSON moves that the blank for the term of duration should be filled with three years, observing at the same time that he preferred this short period, on the supposition that a re-eligibility would be provided for.

Mr. PINCKNEY moves for seven years.

Mr. SHERMAN was for three years, and against the doctrine of rotation, as throwing out of office the men best qualified to execute its duties.

Mr. MASON was for seven years at least, and for prohibiting a re-eligibility as the best expedient both for preventing the effect of a false complaisance on the side of the Legislature towards unfit characters; and a temptation on the side of the Executive to intrigue with the Legislature for a re-appointment.

Mr. BEDFORD [Del.] was strongly opposed to so long a term as seven years. He begged the committee to consider what the situation of the country would be, in case the first magistrate should be saddled on it for such a period and it should be found on trial that he did not possess the qualifications ascribed to him, or should lose them after his appointment. An impeachment he said would be no cure for this evil, as an impeachment would reach misfeasance only, not incapacity. He was for a triennial election, and for an ineligibility after a period of nine years.

On the question for seven years,

Mass. divided. Conn. no. N. Y. ay. N. J. ay. Penn. ay. Del. ay. Va. ay. N. C. no. S. C. no, Geo. no. There being 5 ays, 4 noes, 1 divided, a question was asked whether a majority had voted in the affirmative? The President decided that it was an affirmative vote.

VIII. The powers of the President.

Executive powers are set forth in the Constitution. The President's actual achievements are generally determined by

[1] The motion was carried, with the bracketed words struck out.

his personality, influence, administrative capacity, the strength of his party and his control of it, and his theory of executive power.

A. The legislative or veto power. After both houses shall have passed a bill, it is presented to the President. If he approves it, he signs it. If not, it is returned to the house from which it originated with a statement of his objection. This house proceeds to reconsider, and if approved by two-thirds of both houses it becomes a law. If a bill is not returned by the President within ten days after its presentation, it automatically becomes a law, unless the adjournment of Congress prevents its return. The term "pocket veto" is applied to bills which fail to receive the President's approval and which are not returned to Congress because of the adjournment of that body.

B. Minor powers of the President. The power to consult heads of executive departments as to questions arising in their respective departments gives him constitutional control *over* the cabinet. Under the right to inform Congress of the state of the Union, he submits his annual and special messages. He gets contact with legislation in exercising the right to recommend to Congress measures which he may deem wise, expedient and necessary. He issues commissions to officers of the United States. Moreover, he may adjourn Congress in case of disagreement between the two houses, and may convene it in extra session.

C. The power of appointment. Ambassadors, Public Ministers, Consuls, Judges of the Supreme Court, and other officers of the United States, whose appointment is not otherwise provided for, are to be appointed by the President, with the advice and consent of the Senate. Congress may vest in the President alone, in the courts of law or in the heads of departments, the appointment of inferior officers. The President has generally the power of removal without consulting the Senate. Congressional privileges of selecting officers, and party patronage, have limited the President's discretion in appointments.

D. The execution of laws. The constitution states that the President shall "take care that the laws be faithfully executed." Moreover, he takes an oath of office to this effect. This is the most important executive function. Execution of a law of Congress is often limited by the terms of the statute

itself. Many quasi-legislative and quasi-judicial duties are conferred upon the President. Execution of laws extends to treaties of the United States. The President has, therefore, a large ordinance power, and much latitude in law enforcement. The President must see to it that the administrative officers perform their legal duties, but cannot instruct them as to the methods used. He is the head of the national administration.

E. Commander-in-Chief. The President is commander-in-chief of the army and navy, and of the militia when called into the service of the United States. He may order the army and navy anywhere, if the appropriations will allow. Only Congress may declare war, but the President may, by troop movements, make war inevitable.

F. Power in foreign relations. The President is given the power to appoint Ambassadors and Consuls with the advice and consent of the Senate. He can make treaties with the advice and consent of two-thirds of the Senators present when a treaty is under consideration. He receives Ambassadors from foreign countries. As commander-in-chief, he must repel invasions and carry on war declared by Congress. He has the power of recognition of foreign states and governments. He is the only representative of the nation in dealing with foreign nations. The Supreme Court is voluntarily bound by the President's decision in regard to questions of foreign relations in their nature political.

G. The pardoning power. The President may pardon any one guilty of an offense against the United States before and after either conviction or indictment. Under amnesty, he may pardon a class and make provision whereby persons affected may establish their membership in that class. Under reprieves, he may suspend execution of sentence for one reason or another. Congress cannot restrict the power of pardon.

IX. The political position of the President.

In practice, the President is chosen because of the support of a political party. The extra-constitutional development of the office has given to it a position not intended by the framers of the Constitution. The President, representing the whole country, can, through messages, appointments, speaking and writing, public appeal, and the power of veto, control his party, and thus control legislation. President Wilson, by assuming the rôle of party leader while President, contributed

an executive leadership in legislation much like that in parliamentary governments.

The office of President entered upon a new and distinct phase under President Roosevelt, who expressed his views of executive power in the following terms:

> The most important factor in getting the right spirit in my administration, next to the insistence upon courage, honesty, and a genuine democracy of desire to serve the plain people, was my insistence upon the theory that the executive power was limited only by specific restrictions and prohibitions appearing in the Constitution, or imposed by the Congress under its Constitutional powers. My view was that every executive officer, and above all, every executive officer in high position, was a steward of the people, bound actively and affirmatively to do all he could for the people, and not to content himself with the negative merit of keeping his talents undamaged in a napkin. I declined to adopt the view that what was imperatively necessary for the nation could not be done by the President unless he could find some specific authorization to do it. My belief was that it was not only his right but his duty to do anything that the needs of the nation demanded unless such acts were forbidden under the Constitution or by the laws. Under this interpretation of executive power, I did and caused to be done many things not previously done by the Presidents and the heads of departments. I did not usurp power, but I did greatly broaden the use of executive power. In other words, I acted for the common well-being of all our people, whenever and in whatever manner was necessary, unless prevented by direct Constitutional or legal prohibition. I did not care a rap for the mere form and show of power; I cared immensely for the use that could be made of the substance.

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CHAPTER XII

THE LEGISLATIVE SYSTEM: THE SENATE AND THE HOUSE OF REPRESENTATIVES

I. Plans for the legislative system.

The *Virginia* plan, presented by Randolph, proposed that the national legislature should consist of two houses, with the members apportioned among the states according to their wealth or population. The *New Jersey* plan, presented by Paterson, suggested a national legislature of one house, representing the states as units in the federal system, where all states, irrespective of wealth, population, or extent of territory, would have an equal voice. Over these two plans for the legislature, the Convention was deadlocked.

II. The Great Compromise of the Constitutional Convention.

Between these opposite points of view, representing the legitimate economic and social interests of the larger and smaller estates, some compromise was necessary. Franklin, mediating generally between conflicting groups, suggested that the lower house be elected according to population and given exclusive power in initiating tax legislation, and that equal representation be prescribed in the upper house, with the understanding that certain exclusive rights be conferred upon it. This plan prevailed. Hamilton favored two houses, one elected by the people, and one elected indirectly. The agreement was in effect that the House should be national and the Senate federal.

The Great Compromise of the Constitutional Convention was reached on July 3, 1787. It is thus described in Yates's *Notes:*

> The *grand committee* met. Mr. Gerry was chosen chairman.
>
> The committee proceeded to consider in what manner they should discharge the business with which they were entrusted. By the proceedings in the convention they were so equally divided on the important question of *representation in the two branches,* that the idea of a conciliatory adjustment must have been in contemplation of the house in the appointment of this committee. But still how

to effect this salutary purpose was the question. Many of the members, impressed with the utility of a general government, connected with it the indispensable necessity of a representation from the states *according to their numbers and wealth;* while others, equally tenacious of the rights of the states, would admit of no other representation but such *as was strictly federal,* or in other words, *equality of suffrage.* This brought on a discussion of the principles on which the house had divided, and in a lengthy recapitulation of the arguments advanced in the house in support of these opposite propositions. As I had not openly explained my sentiments on any former occasion on this question, but constantly in giving my vote, *showed my attachment to the national government on federal principles, I took this occasion to explain my motives — (see a copy of my speech hereunto annexed).*

These remarks gave rise to a motion of Dr. Franklin, which after some modification was agreed to, and made the basis of the following report to the committee.

The committee to whom was referred the eighth resolution, reported from the committee of the whole house, and so much of the seventh as had not been decided on, submit the following report:

That the subsequent propositions be recommended to the convention, on condition that both shall be generally adopted.

That in the first branch of the legislature, each of the states now in the union, be allowed one member for every 40,000 inhabitants, of the description reported in the seventh resolution of the committee of the whole house — That each state, not containing that number, shall be allowed one member.

That all bills for raising or apportioning money, and for fixing salaries of the officers of the government of the United States, shall originate in the first branch of the legislature, and shall not be altered or amended by the second branch; and that no money shall be drawn from the public treasury, but in pursuance of appropriations to be originated in the first branch.

That in the second branch of the legislature, *each state shall have an equal vote.*

III. The Senate.

A. Method of election. It was finally agreed to leave the election of Senators to the state legislatures. This method, it was urged, would have the following results: the states, each electing two senators, would link the states to the nation as cooperating units of a federal system; would give more security to the commercial interests; would operate as a check against the landed interests; and would result in securing men of influence and distinction as senators.

Wilson proposed the popular election of senators.

B. Length of term. Morris, Madison, and Hamilton discussed the rôle of the Senate. This was closely connected with

the term of office. Morris favored a term for life without pay. At first it was agreed that a seven-year term should prevail. This was reconsidered, and the terms of four, seven and eight years were suggested and considered. Finally, upon motion of Wilson, a six-year term was adopted.

C. Special functions of the Senate. It was agreed that the Senate should enjoy these special functions: 1. Advice and consent to appointments by the President of ambassadors, public ministers, consuls, judges of the Supreme Court, and other officers of the United States whose appointment is not otherwise provided for (the confirmation of appointments). 2. Advice and consent of two-thirds of the senators present when a treaty is under consideration, to treaties made by the President (ratification of treaties). 3. The trial of impeachments.

D. Devices which were used to check the acts of the more democratic House through a strong Senate:

1. Senators were to be chosen by the state legislatures rather than directly by the voters. In this way their election was removed from popular control.

2. Their term was to be for six, instead of two years.

3. Continuity of the Senate was to be maintained by the retirement of only one-third of the senators at one time, and the retention in service of two-thirds of the Senate.

4. Senators were to be 30 years of age.

E. Constitutional requirements of senators. These are:

1. A citizen of the United States for nine years.

2. Not less than thirty years of age.

3. An inhabitant of the state where he is elected.

F. Representation. It was agreed that there should be two Senators from each state, and that no state could be deprived of its equal representation in the Senate without its consent.

G. The rôle of the Senate.

Madison's notes of the debates of the Constitutional Convention give a comprehensive account of the discussion of the Senate's place in the federal scheme. The discussion took place on June 7, 1787, in the committee of the whole:

> Mr. DICKINSON [Del.] now moved 'that the members of the second branch (of the Legislature) ought to be chosen by the individual legislatures.'
>
> Mr. SHERMAN seconded the motion; observing that the particular States would thus become interested in supporting the national gov-

ernment, and that a due harmony between the two governments would be maintained. He admitted that the two ought to have separate and distinct jurisdictions, but that they ought to have a mutual interest in supporting each other.

Mr. PINCKNEY. If the small states should be allowed one Senator only, the number will be too great, and there will be 80 at least.

Mr. DICKINSON had two reasons for his motion. 1. Because the sense of the States would be better collected through their governments, than immediately from the people at large. 2. Because he wished the Senate to consist of the most distinguished characters, distinguished for their rank in life and their weight of property, and bearing as strong a likeness to the British House of Lords as possible; and he thought such characters more likely to be selected by the State Legislatures than in any other mode. The greatness of the number was no objection with him. He hoped there would be 80, and twice 80 of them. If their number should be small the popular branch could not be balanced by them. The legislature of a numerous people ought to be a numerous body.

Mr. WILLIAMSON [N. C.] preferred a small number of Senators, but wished that each State should have at least one. He suggested 25 as a convenient number. The different modes of representation in the different branches will serve as a mutual check.

Mr. BUTLER was anxious to know the ratio of representation before he gave any opinion.

Mr. WILSON. If we are to establish a national government, that government ought to flow from the people at large. If one branch of it should be chosen by the Legislatures, and the other by the people, the two branches will rest on different foundations, and dissensions will naturally arise between them. He wished the Senate to be elected by the people as well as the other branch, and the people might be divided into proper districts for the purpose, and he moved to postpone the motion of Mr. Dickinson, in order to take up one of that import.

Mr. MORRIS [Penn.] seconded him.

Mr. READ [Del.] proposed 'that the Senate should be appointed by the Executive Magistrate out of a proper number of persons to be nominated by the individual legislatures.' He said he thought it his duty to speak his mind frankly. Gentlemen he hoped would not be alarmed at the idea. Nothing short of this approach towards a proper model of government would answer the purpose, and he thought it best to come directly to the point at once. His proposition was not seconded nor supported.

Mr. MADISON. If the motion [of Mr. Dickinson] should be agreed to, we must either depart from the doctrine of proportional representation or admit into the Senate a very large number of members. The first is inadmissible, being evidently unjust. The second is inexpedient. The use of the Senate is to consist in its proceeding with more coolness, with more system, and with more wisdom, than the popular branch. Enlarge their number, and you communicate to them the vices which they are meant to correct.

He differed from Mr. D. who thought that the additional number would give additional weight to the body. On the contrary, it appeared to him that their weight would be in an inverse ratio to their numbers. The example of the Roman Tribunes was applicable. They lost their influence and power, in proportion as their number was augmented. The reason seemed to be obvious: they were appointed to take care of the popular interests and pretensions at Rome, because the people by reason of their numbers could not act in concert, and were liable to fall into factions among themselves, and to become a prey to their aristocratic adversaries. The more the representatives of the people, therefore, were multiplied, the more they partook of the infirmities of their constituents, the more liable they became to be divided among themselves either from their own indiscretions or the artifices of the opposite faction, and of course the less capable of fulfilling their trust. When the weight of a set of men depends merely on their personal characters, the greater the number the greater the weight. When it depends on the degree of political authority lodged in them, the smaller the number the greater the weight. These considerations might perhaps be combined in the intended Senate; but the latter was the material one.

Mr. GERRY. Four modes of appointing the Senate have been mentioned. 1. By the first branch of the National Legislature. This would create a dependence contrary to the end proposed. 2. By the National Executive. This is a stride towards monarchy that few will think of. 3. By the people. The people have two great interests, the landed interest, and the commercial, including the stockholders. To draw both branches from the people will leave no security to the latter interest; the people being chiefly composed of the landed interest, and erroneously supposing that the other interests are adverse to it. 4. By the individual legislatures. The elections being carried thro' this refinement, will be most likely to provide some check in favor of the commercial interest against the landed; without which oppression will take place, and no free Government can last long where that is the case. He was therefore in favor of this last.

Mr. DICKINSON. The preservation of the States in a certain degree of agency is indispensable. It will produce that collision between the different authorities which should be wished for in order to check each other. To attempt to abolish the States altogether would degrade the councils of our country, would be impracticable, would be ruinous. He compared the proposed national system to the solar system, in which the States were the planets, and ought to be left to move freely in their proper orbits. The gentleman from Pennsylvania wished, he said, to extinguish these planets. If the State Governments were excluded from all agency in the national one, and all power drawn from the people at large, the consequence would be that the national Government would move in the same direction as the State Governments now do, and would run into all the same mischiefs. The reform would only unite the thirteen small streams into one great current pursuing the same

course without any opposition whatever. He adhered to the opinion that the Senate ought to be composed of a large number, and that their influence from family, weight, and other causes would be increased thereby. He did not admit that the Tribunes lost their weight in proportion as their number was augmented, and gave a historical sketch of this institution. If the reasoning of Mr. Madison was good, it would prove that the number of the Senate ought to be reduced below ten, the highest number of the tribunitial corps.

Mr. WILSON. The subject it must be owned is surrounded with doubts and difficulties. But we must surmount them. The British government cannot be our model. We have no materials for a similar one. Our manners, our laws, the abolition of entails and of primogeniture, the whole genius of the people are opposed to it. He did not see the danger of the States being devoured by the national government. On the contrary, he wished to keep them from devouring the national government. He was not, however, for extinguishing these planets as was supposed by Mr. D. Neither did he, on the other hand, believe that they would warm or enlighten the sun. Within their proper orbits they must still be suffered to act for subordinate purposes for which their existence is made essential by the great extent of our country. He could not comprehend in what manner the landed interest would be rendered less predominant in the Senate by an election through the medium of the Legislatures, than by the people themselves. If the Legislatures, as was now complained, sacrified the commercial to the landed interest, what reason was there to expect such a choice from them as would defeat their own views? He was for an election by the people in large districts which would be most likely to obtain men of intelligence and uprightness; subdividing the districts only for the accommodation of voters.

Mr. MADISON could as little comprehend in what manner family weight, as desired by Mr. D., would be more certainly conveyed into the Senate through elections by the State Legislatures, than in some other modes. The true question was in what mode the best choice would be made? If an election by the people, or thro' any other channel than the State Legislatures promised as uncorrupt and impartial a preference of merit, there could surely be no necessity for an appointment by those Legislatures. Nor was it apparent that a more useful check would be derived thro' that channel than from the people thro' some other. The great evils complained of were that the State Legislatures run into schemes of paper money, etc., whenever solicited by the people, and sometimes without even the sanction of the people. Their influence, then, instead of checking a like propensity in the National Legislature, may be expected to promote it. Nothing can be more contradictory than to say that the National Legislature without a proper check, will follow the example of the State Legislatures, and in the same breath, that the State Legislatures are the only proper check.

Mr. SHERMAN opposed elections by the people in districts, as not likely to produce such fit men as elections by the State Legislatures.

Mr. GERRY insisted that the commercial and monied interests would be more secure in the hands of the State Legislatures, than of the people at large. The former have more sense of character, and will be restrained by that from injustice. The people are for paper money when the Legislatures are against it. In Massachusetts the county conventions had declared a wish for a depreciating paper that would sink itself. Besides, in some States there are two branches in the Legislature, one of which is somewhat aristocratic. There would therefore be so far a better chance of refinement in the choice. There seemed, he thought, to be three powerful objections against elections by districts. 1. It is impracticable; the people cannot be brought to one place for the purpose; and whether brought to the same place or not, numberless frauds would be unavoidable. 2. Small States forming part of the same district with a large one, or with a large part of a large one, would have no chance of gaining an appointment for its citizens of merit. 3. A new source of discord would be opened between different parts of the same district.

Mr. PINCKNEY thought the second branch ought to be permanent and independent, and that the members of it would be rendered more so by receiving their appointments from the State Legislatures. This mode would avoid the rivalships and discontents incident to the election by districts. He was for dividing the States into three classes according to their respective sizes, and for allowing the first class three members, to the second, two, and to the third, one.

On the question for postponing Mr. Dickinson's motion referring the appointment of the Senate to the State Legislatures, in order to consider Mr. Wilson's for referring it to the people,

Mass. no. Conn. no. N. J. no. Pa. ay. Del. no. Md. no. Va. no. N. C. no. S. C. no. G. no.

Col. MASON. Whatever power may be necessary for the National Government a certain portion must necessarily be left in the States. It is impossible for one power to pervade the extreme parts of the United States so as to carry equal justice to them. The State Legislatures also ought to have some means of defending themselves against encroachments of the National Government. In every other department we have studiously endeavored to provide for its self-defence. Shall we leave the States alone unprovided with the means for this purpose? And what better means can we provide than the giving them some share in, or rather to make them a constituent part of, the national establishment? There is danger on both sides no doubt; but we have only seen the evils arising on the side of the State Governments. Those on the other side remain to be displayed. The example of Congress does not apply. Congress had no power to carry their acts into execution as the national government will have.

On Mr. DICKINSON'S motion for an appointment of the Senate by the State Legislatures:

Mass. ay. Conn. ay. N. Y. ay. Pa. ay. Del. ay. Md. ay. Va. ay. N. C. ay. S. C. ay. Geo. ay.

IV. The House of Representatives.

A. Method of election. Gerry was of the opinion that all the evils of the nation had been caused by too much democracy, but the people should have something to say about their government. Pinckney favored allowing the legislature to select the members of the lower house, because the people did not know how to select their representatives. It was decided, under the Great Compromise, that the House should be national in character, and that the time, place, and manner of holding the Congressional elections should be fixed by the state legislatures. Congress may alter the arrangements of the state legislatures.

B. Length of term. One year was proposed, at first, as the proper term of service. It was later decided that the term of office should be two years, the entire membership being renewed every two years.

C. Special functions of the House. Under the Constitution, the two special functions of the House are:

1. The right to originate all money bills and tax legislation.
2. To prosecute in cases of impeachment.

D. Constitutional requirements of Representatives. To be a representative, one must be:

1. A citizen of the United States for seven years.
2. Twenty-five years of age.
3. An inhabitant of the state where he is chosen.

E. Apportionment of representatives and direct taxes. It was provided that representatives and direct taxes should be apportioned among the several states according to population. The South, lacking a large free white population, and great commercial wealth, which the North possessed, sought to count the slave population as a basis for representation, and to apportion taxes according to the number of free white inhabitants, rather than according to wealth. It was agreed that three-fifths of the slaves should be counted toward direct taxes and representation, and that all free white persons, including indentured servants, should be counted. It was provided that the number of representatives should never exceed one for each 30,000 of the population.

Each state is entitled to at least one representative.

F. Suffrage. Morris was of the opinion that only freeholders should vote. Madison declared that the state legislatures were elected by freeholders, with bad results. It was

decided that the representatives should be chosen by the people of the several states, and that "the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature." In brief, the framers of the Constitution adopted the suffrage requirements of the states.

G. The place of the Lower House. Madison describes the discussion of May 30, 1787, on the position of the lower house, in the following terms:

> In committee of the whole on Mr. Randolph's propositions.
>
> The 3d Resolution 'that the National Legislature ought to consist of two branches' was agreed to without debate or dissent, except that of Pennsylvania, given probably from complaisance to Doctor Franklin, who was understood to be partial to a single House of legislation.
>
> Resolution 4, first clause 'that the members of the first branch of the National Legislature ought to be elected by the people of the several States' being taken up,
>
> Mr. SHERMAN [Conn.] opposed the election by the people, insisting that it ought to be by the State Legislatures. The people, he said, immediately should have as little to do as may be about the government. They want information, and are constantly liable to be misled.
>
> Mr. GERRY [Mass.]. The evils we experience flow from the excess of democracy. The people do not want virtue, but are the dupes of pretended patriots. In Massachusetts it had been fully confirmed by experience that they are daily misled into the most baneful measures and opinions by the false reports circulated by designing men, and which no one on the spot can refute. One principal evil arises from the want of due provision for those employed in the administration of government. It would seem to be a maxim of democracy to starve the public servants. He mentioned the popular clamour in Massachusetts for the reduction of salaries and the attack made on that of the Governor, though secured by the spirit of the Constitution itself. He had he said been too republican heretofore: he was still however republican, but had been taught by experience the danger of the levelling spirit.
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> Mr. MASON [Va.] argued strongly for an election of the larger branch by the people. It was to be the grand depository of the democratic principle of the Government. It was, so to speak, to be our House of Commons. It ought to know and sympathise with every part of the community; and ought therefore to be taken not only from different parts of the whole republic, but also from different districts of the larger members of it, which had in several instances, particularly in Virginia, different interests and views arising from difference of produce, of habits, etc., etc. He admitted that we had been too democratic, but was afraid we should incautiously run into the opposite extreme. We ought to attend to

the rights of every class of the people. He had often wondered at the indifference of the superior classes of society to this dictate of humanity and policy; considering that however affluent their circumstances, or elevated their situations might be, the course of a few years not only might but certainly would distribute their posterity throughout the lowest classes of society. Every selfish motive, therefore, every family attachment, ought to recommend such a system of policy as would provide no less carefully for the rights and happiness of the lowest than of the highest orders of citizens.

Mr. WILSON [Penn.] contended strenuously for drawing the most numerous branch of the Legislature immediately from the people. He was for raising the federal pyramid to a considerable altitude, and for that reason wished to give it as broad a basis as possible. No government could long subsist without the confidence of the people. In a republican government this confidence was peculiarly essential. He also thought it wrong to increase the weight of the State Legislatures by making them the electors of the National Legislature. All interference between the general and local governments should be obviated as much as possible. On examination it would be found that the opposition of States to federal measures had proceeded much more from the officers of the States, than from the people at large.

Mr. MADISON considered the popular election of one branch of the National Legislature as essential to every plan of free government. He observed that in some of the States one branch of the Legislature was composed of men already removed from the people by an intervening body of electors. That if the first branch of the general legislature should be elected by the State Legislatures, the second branch elected by the first, the Executive by the second together with the first; and other appointments again made for subordinate purposes by the Executive, the people would be lost sight of altogether; and the necessary sympathy between them and their rulers and officers, too little felt. He was an advocate for the policy of refining the popular appointments by successive filtrations, but thought it might be pushed too far. He wished the expedient to be resorted to only in the appointment of the second branch of the Legislature, and in the executive and judiciary branches of the government. He thought, too, that the great fabric to be raised would be more stable and durable, if it should rest on the solid foundation of the people themselves, than if it should stand merely on the pillars of the Legislatures.

Mr. GERRY did not like the election by the people. The maxims taken from the British Constitution were often fallacious when applied to our situation which was extremely different. Experience he said had shewn that the State legislatures drawn immediately from the people did not always possess their confidence. He had no objection, however, to an election by the people, if it were so qualified that men of honor and character might not be unwilling to be joined in the appointments. He seemed to think the people might nominate a certain number out of which the State legislatures should be bound to choose.

Mr. BUTLER [S. C.] thought an election by the people an impracticable mode.

On the question for an election of the first branch of the National Legislature by the people:

Mass. ay. Conn. div. N. Y. ay. N. J. no. Penn. ay. Del. div. Va. ay. N. C. ay. S. C. no. Geo. ay.

V. Constitutional privileges and limitations of Congress.

A two-thirds vote in each house is necessary to expel a member. A journal must be kept by each house and published. One-fifth of either house can demand a roll call of yeas and nays. Subject to these limitations, the houses elect their own officers, compel attendance of members, and prescribe rules of procedure and discipline.

VI. The powers of Congress.

A. The plans. The Virginia plan proposed to confer upon the national legislature jurisdiction over all matters not pertaining to the states. The New Jersey plan proposed an enumeration of powers. Hamilton and Madison favored giving to Congress general legislative authority over matters national in character. The majority, fearing the effect of a sweeping grant of powers, insisted on enumerating them in detail.

B. The general powers of Congress, not existing under the Articles. These may be grouped as follows:

1. *Taxation.* One of the capital defects of the Articles was the impotence of the government of the Confederation in the raising of public revenues. All agreed that money must be raised to meet the expenses of government and to discharge the public debt. It was therefore decided that Congress should have the power to lay and collect taxes, duties, imposts, and excises. These taxes could be collected directly from the citizens without the necessity of acting through state governments.

2. *The regulation of commerce.* The Northern states desired the regulation of international commerce by the federal government. This would centralize authority and simplify regulations, taking the place of state agreements. The Southern states opposed this, fearing protective tariffs against foreign goods, especially English. Both the North and South, after settling the question of the importation of slaves, agreed that tariffs levied by states, and discriminatory duties, should

cease. It was eventually agreed that interstate and foreign commerce should be regulated by the national government. The approval of treaties by the Senate was demanded by the South as a protection against the North.

3. *The national defense.* The members of the Convention were opposed to huge military establishments. Nevertheless, they agreed that the government should have the power to deal effectively with insurrections and invasions, and to prepare for these contingencies. The system of each state furnishing quotas had failed. Direct authority against and over individuals was needed. Hence Congress was authorized to raise and support an army and navy; to make rules and regulations for their government; to provide for the organization, arming and disciplining of the militia in the states; to utilize this militia to enforce the laws, suppress insurrections and repel invasions; to declare war and make rules for captures on land and sea; and to make all laws necessary and proper to carry these powers into effect.

4. *The "Necessary and Proper" clause.* The enumeration of powers by the Constitution was not regarded as sufficient by the makers of the Constitution. To insure their execution, the Congress was authorized to make all laws "necessary and proper" for carrying into effect any and all of the enumerated powers. This clause was later given an interpretation which greatly expanded the powers of the federal government.

C. The powers of Congress as given in the Constitution.

1. Lay and collect taxes, and provide for the general welfare.
2. Borrow money.
3. Regulate foreign and domestic commerce.
4. Regulate naturalization of aliens.
5. Coin money, punish counterfeiters, and fix the standard of weights and measures.
6. Regulate bankruptcies.
7. Establish postoffices.
8. Grant patents and copyrights.
9. Constitute tribunals inferior to the Supreme Court.
10. Define and punish felonies and piracies on the high seas and offenses against the law of nations.
11. Declare war and regulate captures on land and sea.
12. Raise and support an army and navy.
13. Organize and discipline the militia.

14. Exercise exclusive jurisdiction over a federal district which may become the seat of government.

15. Make all laws necessary and proper for carrying into effect the foregoing powers, and all other powers vested by the Constitution in the government of the United States, or any officer or department thereof.

D. Limitations on the powers of Congress.

1. The migration of persons desired by the states could not be prohibited until 1808.

2. The writ of habeas corpus cannot be suspended except where required by the public safety on account of rebellion or invasion.

3. No bill of attainder to be passed.

4. No expost facto law can be passed.

5. No capitation or other direct tax can be passed except in proportion to the census or enumeration.[1]

6. No export tax can be levied.

7. Freedom of preferential commerce and navigation regulations is provided for the commerce of one state as regards the port of another state.

8. All money drawn from the Treasury must be in pursuance of an appropriation made by law, and a statement of public expenditures shall be published from time to time.

9. No title of nobility shall be granted by the United States, and no officer of the United States may accept any emolument, title, office or present of any kind from any foreign state or ruler, without the consent of Congress.

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[1] Superseded by the sixteenth amendment.

CHAPTER XIII

THE JUDICIARY AND THE POWER OF THE COURTS

I. The system of courts proposed.

The advocates of nationalism wanted to write into the Constitution provisions for a Supreme and inferior courts. The provision adopted was a compromise, and was supplemented by a judiciary act passed by the first Congress. Under the Articles, there was no judiciary to require states and citizens to obey the laws of the country. There was a natural fear of giving the control of the judicial system into the hands of the federal government, and of giving the courts a status independent of the legislature. Finally, they agreed to a Supreme Court and such inferior courts as Congress might establish.

The remarks of John Marshall at the Virginia ratifying convention on the system of courts provided in the Constitution are significant at this point:

Mr. John Marshall. Mr. Chairman, this part of the plan[1] before us is a great improvement on that system from which we are now departing. Here are tribunals appointed for the decision of controversies which were before either not at all, or improperly, provided for. That many benefits will result from this to the members of the collective society, every one confesses. Unless its organization be defective, and so constructed as to injure, instead of accommodating, the convenience of the people, it merits our approbation. After such a candid and fair discussion by those gentlemen who support it, after the very able manner in which they have investigated and examined it — I conceived it would be no longer considered as so very defective, and that those who opposed it would be convinced of the impropriety of some of their objections. But I perceive they still continue the same opposition. Gentlemen have gone on an idea that the federal courts will not determine the causes which may come before them with the same fairness and impartiality with which other courts decide. What are the reasons of this supposition? Do they draw them from the manner in which the judges are chosen, or the tenure of their office? What is it that makes us trust our judges? Their independence in office, and manner of appointment. Are not the judges of the federal court chosen with as much wisdom as the judges of the State Governments? Are

[1] Constitution, Art. III, ss. i, ii.

they not equally, if not more independent? If so, shall we not conclude that they will decide with equal impartiality and candour? If there be as much wisdom and knowledge in the United States as in a particular State, shall we conclude that the wisdom and knowledge will not be equally exercised in the selection of judges?

The principle on which they object to the federal jurisdiction seems, to me, to be founded on a belief that there will not be a fair trial had in those courts. If this committee will consider it fully they will find it has no foundation, and that we are as secure there as anywhere else. What mischief results from some causes being tried there? Is there not the utmost reason to conclude that judges, wisely appointed, and independent in their office, will never countenance any unfair trial? What are the subjects of its jurisdiction? Let us examine them with an expectation that causes will be as candidly tried there as elsewhere, and then determine. The objection which was made by the honorable member who was first up yesterday (Mr. MASON) has been so fully refuted that it is not worth while to notice it. He objected to Congress having power to create a number of inferior courts, according to the necessity of public circumstances. I had an apprehension that those gentlemen who placed no confidence in Congress would object that there might be no inferior courts. I own that I thought that those gentlemen would think there would be no inferior courts, as it depended on the will of Congress, but that we should be dragged to the centre of the Union. But I did not conceive that the power of increasing the number of courts could be objected to by any gentleman, as it would remove the inconvenience of being dragged to the centre of the United States. I own that the power of creating a number of courts is, in my estimation, so far from being a defect, that it seems necessary to the perfection of this system. After having objected to the number and mode, he objected to the subject matter of their cognizance. [Here Mr. Marshall read the second section.]

These, sir, are the points of federal jurisdiction to which he objects, with a few exceptions. Let us examine each of them with a supposition that the same impartiality will be observed there as in other courts, and then see if any mischief will result from them. With respect to its cognizance in all cases arising under the Constitution and the laws of the United States, he says that the laws of the United States being paramount to the laws of the particular States, there is no case but what this will extend to. Has the government of the United States power to make laws on every subject? Does he understand it so? Can they make laws affecting the mode of transferring property, or contracts, or claims, between citizens of the same State? Can they go beyond the delegated powers? If they were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void. It will annihilate the State courts, says the honorable gentleman. Does not every gentleman here

know that the causes in our courts are more numerous than they can decide, according to their present construction? Look at the dockets. You will find them crowded with suits, which the life of man will not see determined. If some of these suits be carried to other courts, will it be wrong? They will still have business enough.

Then there is no danger that particular subjects, small in proportion, being taken out of the jurisdiction of the State judiciaries, will render them useless and of no effect. Does the gentleman think that the State courts will have no cognizance of cases not mentioned here? Are there any words in this Constitution which exclude the courts of the States from those cases which they now possess? Does the gentleman imagine this to be the case? Will any gentleman believe it? Are not controversies respecting lands claimed under the grants of different States the only controversies between citizens of the same State which the federal judiciary can take cognizance of? The case is so clear that to prove it would be a useless waste of time. The State courts will not lose the jurisdiction of the causes they now decide. They have a concurrence of jurisdiction with the federal courts in those cases in which the latter have cognizance.

II. The Council of Revision under the Virginia plan.

It was proposed to form a council composed of the executive and a certain number of the judges to constitute the veto power. This plan was decisively rejected. The question of giving the court the power to pass upon the constitutionality of laws was not brought up in the Convention.

III. Method of choosing the judges.

This caused much trouble. Virginia suggested election by the legislature. Wilson of Pennsylvania opposed this suggestion on grounds of possible intrigue, and proposed their appointment by the President. Madison suggested their appointment by the Senate. It was the view of Franklin that the legal profession should select the judges. On July 13, 1787, the Convention unanimously agreed to allow the Senate to appoint the judges. On July 16, an attempt was made to reconsider, and on July 18, it was agreed that the President should appoint the judges with the advice and consent of the Senate.

IV. Term of office.

The life term, or during "good behavior," was favored by a majority of the Convention.

V. Opinions of leading members of the Convention regarding the judicial review of legislation.

This great question has been discussed periodically. During Jefferson's time, the discussion was at white heat. The famous Dred Scott decision led the Republican party to make war on the judiciary, and led to legislation limiting its power. In 1895, there was further criticism on account of the income tax decision.

What was the intention of the Convention as to this question? A number of authorities have claimed that judicial review is usurpation of power. The opinion of the legal profession generally is favorable to this right, and to the view that the Revolution strengthened it.

Dr. Charles A. Beard, in his book, *The Supreme Court and the Constitution*, has published the results of his research on this subject. Thirteen of the twenty-five leading men expressed the view that the courts would normally pass upon the constitutionality of laws. Three others approved the principle of judicial review by approving the judiciary act of 1789, which act provides methods for bringing questions of constitutionality before the Supreme Court. Of the thirty remaining and less influential members, ten were of the same opinion. According to Beard, at least twenty-six members of the Convention favored the principle, whereas only four are on record as opposing it.

In a book entitled *The Judicial Veto*, by H. A. Davis, the position of Dr. Beard is attacked. He discusses some of the men shown by Beard as favoring the principle, and points out their support of the opposite view. He includes such men as Ellsworth and Paterson in his discussion. It is the theory of Dr. Beard that no considerable number of the people had thought much about the question. Until near the end of the eighteenth century, the doctrine of majority rule had not given the people much concern. It was not until the American Revolution, when the first state constitutions appeared, that government was vested in a majority. Following this, the conservative men saw the need of a check upon the legislature. A House of Lords, or other analogous device, was out of the question. Some other device was necessary. The only place to which they could turn was the courts.

The views of John Marshall on the function of the courts and their relation to the Constitution, are disclosed in his address before the Virginia convention of ratification:

To what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the judiciary? There is no other body that can afford such a protection. But the honorable member objects to it, because he says that the officers of the government will be screened from merited punishment by the federal judiciary. The federal sheriff, says he, will go into a poor man's house and beat him, or abuse his family, and the federal court will protect him. Does any gentleman believe this? Is it necessary that the officers will commit a trespass on the property or persons of those with whom they are to transact business? Will such great insults on the people of this country be allowable? Were a law made to authorize them, it would be void. The injured man would trust to a tribunal in his neighborhood. To such a tribunal he would apply for redress, and get it. There is no reason to fear that he would not meet that justice there which his country will be ever willing to maintain. But, on appeal, says the honorable gentleman, what chance is there to obtain justice? This is founded on an idea that they will not be impartial. There is no clause in the Constitution which bars the individual member injured from applying to the State courts to give him redress. He says that there is no instance of appeals as to fact in common law cases. The contrary is well known to you, Mr. Chairman, to be the case in this Commonwealth. With respect to mills, roads, and other cases, appeals lie from the inferior to the superior court, as to fact as well as law. Is it a clear case, that there can be no case in common law in which an appeal as to fact might be proper and necessary? Can you not conceive a case where it would be productive of advantages to the people at large to submit to that tribunal the final determination, involving facts as well as law? Suppose it should be deemed for the convenience of the citizens that those things which concerned foreign ministers should be tried in the inferior courts, if justice would be done, the decision would satisfy all. But if an appeal in matters of fact could not be carried to the superior court, then it would result that such cases could not be tried before the inferior courts, for fear of injurious and partial decisions.

But, sir, where is the necessity of discriminating between the three cases of chancery, admiralty, and common law? Why not leave it to Congress? Will it enlarge their powers? Is it necessary for them wantonly to infringe your rights? Have you anything to apprehend, when they can in no case abuse their power without rendering themselves hateful to the people at large? When this is the case, something may be left to the legislature freely chosen by ourselves, from among ourselves, who are to share the burdens imposed upon the community, and who can be changed at our pleasure. Where power may be trusted, and there is no motive to abuse it, it seems to me to be as well to leave it undetermined as to fix it in the Constitution.

The following quotations from *The Federalist* indicate the position of Hamilton on the independence of the judiciary and the right of judicial review:

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American Constitutions, a brief discussion of the ground on which it rests cannot be unacceptable.

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There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above the master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A Constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to

that of the people, declared in the Constitution, the judges ought to be governed by the latter, rather than by the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.

This exercise of judicial discretion, in determining between two contradictory laws, is exemplified in a familiar instance. It not uncommonly happens, that there are two statutes existing at one time, clashing in whole or in part with each other, and neither of them containing any repealing clause or expression. In such a case, it is the province of the courts to liquidate and fix their meaning and operation. So far as they can, by any fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done; where this is impracticable, it becomes a matter of necessity to give effect to one, in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is, that the last in order of time shall be preferred to the first. But this is a mere rule of construction, not derived from any positive law, but from the nature and reason of the thing. It is a rule not enjoined upon the courts by legislative provision, but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law. They thought it reasonable, that between the interfering acts of an *equal* authority, that which was the last indication of its will should have the preference.

But in regard to the interfering acts of a superior and subordinate authority, of an original and derivative power, the nature and reason of the thing indicate the converse of that rule as proper to be followed. They teach us that the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and that accordingly, whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.

It can be of no weight to say that the courts, on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise *will* instead of *judgment*, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove anything, would prove that there ought to be no judges distinct from that body. — *Federalist*, No. 78 (Hamilton) (Ford's Ed.) 520–523.

There ought always to be a constitutional method of giving efficacy to constitutional provisions. What, for instance, would avail restrictions on the authority of the state legislatures, without some constitutional mode of enforcing the observance of them? The states, by the plan of the convention, are prohibited from doing a variety of things, some of which are incompatible with the interests of the Union, and others with the principles of good government. The imposition of duties on imported articles, and the emission of

paper money, are specimens of each kind. No man of sense will believe that such prohibitions would be scrupulously regarded, without some effectual power in the government to restrain or correct the infractions of them. This power must either be a direct negative on the state laws, or an authority in the federal courts to overrule such as might be in manifest contravention of the articles of Union. There is no third course that I can imagine. The latter appears to have been thought by the convention preferable to the former, and, I presume, will be most agreeable to the states. — *Federalist,* No. 80 (Hamilton) (Ford's Ed.) 531.

VI. Extent of organization under the Constitution.

Judicial power is vested in one Supreme Court, and such inferior courts as Congress may from time to time ordain and establish. The Constitution provides that the judges of the Supreme Court must be nominated by the President and appointed by and with the advice and consent of the Senate.

VII. Extent of judicial powers; jurisdiction of the Supreme Court.

A. Judicial power, as regards certain *persons* and *parties,* extends under the Constitution to cases affecting Ambassadors, other public Ministers and Consuls; controversies to which the United States is a party; controversies between two or more states; between a state and citizens of another state [2]; between citizens of different states, and between a state and the citizens thereof and foreign states, citizens or subjects. As regards certain *matters,* judicial power extends, regardless of the character of the parties involved, to all cases in law and equity arising under the Constitution, the statutes, and the treaties of the United States, and to all admiralty and maritime cases.

B. The *jurisdiction* of the Supreme Court is original in cases affecting Consuls, Ambassadors, and other Public Ministers, and in cases in which a state may be a party. In all other cases, the jurisdiction of the Supreme Court is appellate, both as to law and fact, except as altered by the Congress.

READING

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[2] Under the eleventh amendment, an American state cannot be sued by American citizens or by citizens of foreign states.

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CHAPTER XIV

THE SLAVERY QUESTION IN THE CONVENTION

I. Opinions of representative members regarding slavery as an institution.

Gouverneur Morris declared slavery to be a nefarious institution, and advocated a tax to raise revenue to be devoted to buying out the slave holders. Mason of Virginia, agreed with Morris and declared that slavery discouraged manufactures and arts. Charles Pinckney defended slavery on historical grounds. Rutledge said slavery was a question of interests, and not one of morality or religion. Ellsworth thought that slavery would in time naturally disappear, due to the non-slave-holding poor whites, who would be injured by it. Sherman of Connecticut thought that slavery would disappear. Gerry did not want slavery as an institution sanctioned by the Constitution, hence the term " slave " or " slavery " does not appear in the instrument. In this manner the framers sidestepped a vital and controversial issue.

II. Inter-state rendition.

Under the Articles, provision was made for the return of fugitives. Under the Constitution, a person charged with treason, felony, or other crime, fleeing from justice and found in another state, must be returned to the jurisdiction of the crime upon demand of the executive authority of the State from which he fled. Moreover, a person held to service or labor under the laws of a state, and escaping to another, could not be discharged from his service under the laws of the state to which he fled, but must be delivered over, upon demand, to the party entitled to his service. This provided for the rendition of fugitive slaves and bond-servants.

III. The regulation of commerce.

This was a dispute between the commercial and agricultural regions. The regulation of foreign commerce by Congress was not agreed to by the South until certain concessions or com-

promises had been made regarding the slave trade, and the questions of representation and direct taxes in relation to the slave population. Since treaties were to be the supreme law of the land, taking precedence of state constitutions and laws, the South insisted upon their ratification by two-thirds of the Senators present, as a protection against the treaty-making power.

IV. The question of the importation of slaves.

Virginia and Maryland opposed the importation of slaves on the ground that the natural increase was more than sufficient. South Carolina and Georgia were in favor of further importations. The North desired a definite provision forbidding the importation of slaves. It was decided that the Congress should not forbid the importation of such persons as any of the states then existing might think proper to admit prior to the year 1808, but a duty not exceeding ten dollars for each person might be levied.

At a later time Great Britain undertook to enforce against American ships American municipal law forbidding the slave trade.

V. The apportionment of representatives and direct taxes.

In the matter of counting negroes as people in the *apportionment of taxes*, the North took the position that slaves were people, and therefore should be taxed. The South argued with effect that money was spent in the South for slaves just as it was spent in the North for manufacturing establishments. The taxing of slaves, therefore, would mean the taxing of purchases in the North. In the matter of counting negroes in the *apportionment of representatives in Congress*, the South argued that the North declared the slaves to be people, therefore they must be counted. The burden of the Northern argument was that the South denied that slaves were people but property bought with a price.

On both of these points, a compromise was necessary. On motion of Wilson, slaves were to be counted to the extent of three-fifths, for purposes of representation and taxation.

READING

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CHAPTER XV

LIMITATIONS ON THE POWERS OF THE STATES

I. Proposals under the different plans.

The Virginia plan proposed giving the states a veto power. Another plan was to control the states by the veto power of the national government. Still another plan was to have the governors appointed by the national government. It was generally agreed, however, that Congress should exercise exclusively the ordinary sovereign powers requisite to the maintenance of membership in family of nations, and that certain limitations must be placed upon the states, in addition to positive grants of power to the Congress, which would prevent state legislatures from paralyzing the national government.

II. "Bill of Credit" clause.

The case of the debtor and his relief occupied the attention of the state legislatures. Many favored the relaxing of the administration of justice and affording facilities for the payment of debts. As a result, the state legislatures passed laws providing for the issue of paper money, in order that debtors might easily discharge their obligations. It was provided in the Constitution that no state should emit bills of credit or make anything but gold or silver legal tender in the payment of debts.

III. "Obligation of Contract" clause.

It was also thought that compliance with contracts should not be rigidly enforced. Consequently, some states passed laws suspending collection of debts, authorizing debtors to pay their obligations with land or personal property, repealing the charter of a college and taking its management from the trustees appointed by law, and had interfered generally with the enforcement of private agreements. The Convention introduced a provision prohibiting states "to impair the obligation of contracts." This clause is not fully explained in the debates. It probably was meant to prevent a state from re-

pudiating its own contracts rather than to regulate private contracts. Later, Marshall interpreted the clause as applying to private contracts, and in this way gave the Supreme Court jurisdiction over a multitude of local questions.

IV. Suppression of domestic insurrections.

An uprising in Massachusetts raised the question of the protection of state authorities in case of revolt. An army and navy and militia were provided for, and the President, upon the application of the state legislature, and, if not in session, the governor of the state, may send troops to suppress domestic insurrections. Moreover, each state is guaranteed a republican form of government.

V. Supremacy of federal law and judicial control.

To provide for the supremacy of federal laws, both as regards positive grants of power and limitations upon the states, and to provide for their effective enforcement, it was provided that "this Constitution and the laws of the United States which shall be made in pursuance thereof and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

It is further provided that members of the state legislatures and executive and judicial officers of the several states shall be bound by oath or affirmation to support the Constitution of the United States.

VI. Other constitutional limitations upon the states.

A. States cannot levy and collect imposts and duties upon exports and imports.

B. States cannot levy a tonnage tax without the consent of Congress.

C. A state may not seriously interfere with interstate commerce.

D. A state has no power over the fiscal system.

E. No state may pass a bill of attainder or *ex post facto* law.

F. No state shall make or enforce any law which may abridge the privileges or immunities of citizens of the United States.

G. No state may deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

VII. Privileges of the states.

A. The states are guaranteed a republican form of government.

B. The states are to be protected against invasion and domestic violence.

C. No state may be divided or joined with one or more states without the consent of the legislatures of the states concerned and of the Congress.

D. Nothing in the Constitution can be construed as prejudicing any claims of any particular state.

E. All powers not delegated to the federal government are reserved to the states or to the people.

F. No state may be deprived of its equal representation in the Senate without its consent.

VIII. Views of the founders.

Madison argued consistently that the Convention was called for the purpose of checking the legislatures of the states. Washington maintained that the main subject for consideration was the establishment of national credit. Hamilton agreed with both, as one was concerned with the end of the Convention, and the other with the means to that end.

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CHAPTER XVI

QUESTIONS OF RATIFICATION AND AMENDMENT

I. The Convention abandoned the principle of unanimous approval of the Constitution.

Under the Articles of Confederation, it was provided that a perpetual union was being formed, and that this union could not be changed without unanimous consent. For this reason, Professor Burgess has declared that there is no connection between the Articles of Confederation and the Constitution of the United States. In his opinion the Constitution is a revolutionary document, and a distinct break from the old system.

It was agreed that the approval of nine states would constitute a ratification.

II. Method of ratification.

The appeal to state conventions instead of to the state legislatures was also regarded by some as revolutionary. This method of ratification was chosen primarily through fear that the state legislatures might refuse their consent. The Congressional resolution calling for the Convention expressly limited the powers of the delegates to that of rendering the Articles adequate, and of submitting their results to Congress for agreement and to the states for confirmation. These limitations were in general confirmed by instructions of the states to their delegations. None of these limitations were observed.

Reasons for adverting to state conventions for ratification may be summarized as follows:

A. State legislatures had always opposed amendments to the Articles of Confederation.

B. The politicians of the state legislatures would oppose the establishment of higher dignitaries over them, and would refuse to give up their privileges under the Articles, of which they would be divested by the Constitution.

C. By concentrating the attention upon the election of dele-

gates to the state conventions, men would be selected who would be more favorably disposed to the Constitution.

D. Popular ratification through conventions popularly elected would give more strength and support to the Constitution.

E. A legislature might rescind its action, whereas a Convention, meeting temporarily, would dissolve or adjourn.

F. The bicameral character of the state legislatures would tend to delay legislation. Moreover, state conventions would not be burdened with ordinary state legislation, and would have all the advantages of a special body.

G. So complete a change in the government as compared with the Articles of Confederation justified as completely a different method of ratification.

III. The amending process.

The early state constitutions made no provision for amendment. The Articles were to be amended by the submission by Congress of a proposal and its unanimous ratification by the states. The Virginia plan proposed that some means should be provided that amendments might be made without the intervention of Congress. Pinckney thought the perfection of the instrument did away with the necessity of ratification. The Committee of Detail proposed that on petition of two-thirds of the state legislatures, the Congress should call a convention. Hamilton is responsible for the present plan, with the aid of Madison. The advocates of the small states wanted the states to initiate amendments. The nationalists favored the other system. This explains the different methods.

How is the Constitution amended? Four methods are authorized by the Constitution:

A. Proposal by two-thirds of both houses of Congress and ratification by three-fourths of the state legislatures.

B. Proposal by two-thirds of both houses of Congress, and ratification by three-fourths of the states in conventions, called for that purpose.

C. Proposal by a national convention called by Congress at the request of two-thirds of the state legislatures, and ratification by three-fourths of the state legislatures.

D. Proposal by a national convention called by Congress at the request of two-thirds of the state legislatures, and rati-

fication by three-fourths of the states in conventions called for that purpose. Either method of proposal may be followed by either method of ratification.

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CHAPTER XVII

THE CONTEST OVER RATIFICATION

I. Transmittal to Congress.

The instrument was sent to the Congress of the Confederation on September 17, 1787, with the request that it be submitted to the conventions of the states through the state legislatures. It was therefore an indirect process — from the Convention to the Congress; from the Congress to the state legislatures; from the state legislatures to the people; from the people to the conventions. On September 28, the Congress under the Articles of Confederation, then meeting in New York, voted to refer the proposition to the states for ratification.

II. Objections advanced to the ratification of the Constitution.

The leading objections were:

A. There was no Bill of Rights included in the Constitution.

B. The supporters of the states and their rights were upheld by such men as Patrick Henry.

C. The small agricultural interests and the pioneering element thought that the commercial interests had been unduly favored.

D. The state legislatures resented the divesting of their privileges.

E. The people interested in paper money opposed the sections of the Constitution relating to this subject.

F. Many opposed it because the delegates had violated their instructions in the kind of the instrument offered and the method of ratification proposed.

III. Ratification by the States.

A. New York. In this state, suffrage requirements were entirely swept away and delegates were elected to the convention under manhood suffrage. Under the instructions to the delegates, it appeared that 23 favored ratification, and 41

were opposed. The leading proponents were Hamilton and Jay, of *Federalist* fame, while the opposition was led by Governor Clinton, Lansing, and Yates.

The *Federalist* had already exercised a profound influence, and now it was turned to good account in New York. Eight states had ratified, and the Virginia and New Hampshire conventions were in session when the New York convention met. After the Federalists and anti-Federalists had engaged in heated arguments, the instrument was ratified by a majority of three votes, 30–27.

B. Massachusetts. The towns elected delegates on October 20, 1787. On January 9, 1788, the convention met, and a majority was opposed. The convention voted by regions as follows: Coast section, 73% for and 27% against; middle section, 14% for and 86% against; the western district, 42% for and 58% against. However, this position was reversed and the Constitution was ratified on February 6, 1788, by a vote of 187–168.

C. Virginia. The Constitution was opposed chiefly by Patrick Henry, George Mason, Richard Henry Lee, and James Monroe. It had the distinguished support of George Washington, James Madison, John Marshall, and Governor Randolph. The convention assembled on June 2, 1788. The unit of representation for delegates was the county. The people in the territory now comprising the states of West Virginia and Kentucky, then in Virginia, were opposed to the Constitution. On the west the counties were large, and the smaller counties of the east controlled the Convention. Only freeholders were allowed to vote for delegates. The percentage of votes, according to regions, was as follows: Tidewater, 80% for and 20% against; Piedmont, 24% for and 76% against; West, 97% for and 3% against. The instrument was ratified on June 25, 1788, by a vote of 89 to 79.

D. Pennsylvania. Here, the battle was bitter. On the morning of September 28, when the Congress voted to submit the instrument to the states, the Federalists in the state legislature at Philadelphia proposed the election of delegates to the state convention at once. The opposition claimed that the Constitution had not yet come before them. On the next day, the news of submission by Congress reached Philadelphia. Those opposed to the Constitution attempted to stay away, but were forced by a mob to attend, and the call for the con-

vention was issued. There were about 75,000 taxpayers in Pennsylvania, but only about 13,000 votes were cast for delegates, due to ignorance of the election, indifference, or opposition. Opposition to the Convention came mainly from the interior, although the town of Pittsburgh, with 400 people, favored the Constitution. The Constitution was ratified on December 12, 1787, by a vote of 46 to 23.

E. Delaware. Here, after a short debate of three days, there was, on December 6, 1787, a unanimous ratification.

F. New Jersey. After the election of the convention in November, 1787, there was a unanimous ratification on December 18, 1787.

G. Connecticut. The convention was elected November 12, 1787; convened January 3, 1788; and the Constitution was ratified on January 9, 1788, by a vote of 120 to 40.

H. Maryland. The convention met in April, 1788, with Luther Martin as the chief opponent of the Constitution. On April 26, 1788, the Constitution was ratified by a vote of 63 to 11.

I. Georgia. The convention met in January, 1788, and unanimously ratified on January 2.

J. South Carolina. The convention contained a majority of delegates from the east. The convention ratified the Constitution on May 23, 1788, by a vote of 149–73. The regional vote was: Coast district, 88% for and 12% against; Interior, 49% for and 51% against.

K. New Hampshire. The Constitution was distributed for purposes of discussion. In the convention the contest, as in Pennsylvania, was between the Federalists and the anti-Federalists. The convention was postponed, and the Constitution was ratified in June.

L. North Carolina. The convention adjourned without ratification. The instrument was eventually ratified on November 21, 1789.

M. Rhode Island. The people of this state had rejected the Constitution upon its submission. On May 29, 1790, Rhode Island ratified the Constitution.

IV. Defense of the Constitution.

The opposition to the Constitution caused distinguished leaders, seeking only the good of the country, to defend it. The leaders in the defense were Hamilton, Madison, and John

Jay, who wrote a series of articles for the newspapers discussing and explaining, with keen insight and irresistible logic, all provisions of the Constitution and their application. It was later published in book form and called *The Federalist.* Other than the Constitution, it has taken front rank among books on American political literature. The support of these men, and of many less able and less distinguished, but thoroughly as sincere, saved the states from disintegration and dissolution, and restored respect for the country abroad.

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CHAPTER XVIII

THE OPERATION OF THE CONSTITUTION UNDER THE REGIME OF THE FEDERALISTS

I. The judiciary act of 1789.

Under this act six justices for the Supreme Court were created. A system of inferior courts, authorized by the Constitution, was established, consisting of thirteen district courts and three circuit courts, and their jurisdiction was defined. Provision was made for appeals from the decisions of state courts to federal courts by Section 25 of the act. This act gave practical application to the intent of certain leaders to establish the supremacy of the courts.

II. The tax and financial proposals of Alexander Hamilton; Opposition by Thomas Jefferson.

A. Funding the national debt. Hamilton gave his attention to the national credit in a celebrated paper called a *Report on Public Credit,* dated January 9, 1790. On January 14, he submitted his plan for funding the national debt. The debt was divided as follows: Due foreign creditors, $11,710,378; due domestic creditors, $42,414,085; floating debt, $2,000,000; making a grand total of $56,124,463. Hamilton's proposal was that all old bonds, certificates of indebtedness, and other promises to pay, issued by the Congress since the beginning of the government should be called in. These obligations should be consolidated, forming a single debt against the credit of the United States. New bonds should be issued to the holders of the old obligations, drawing a fixed rate of interest. This, in the opinion of Hamilton, would restore the national credit, and confidence in it at home and abroad. He also insisted that the outstanding obligations, both national and state, should be redeemed at face value, rather than a small amount above the market price.

This measure was adopted by the Congress.

B. Assumption and funding of state debts. He recommended that the national government take over $18,271,786

in debts of the states. It was a debt, he argued, incurred for the good of all in the prosecution of the Revolution, and should be paid by all. Moreover, it would cause public creditors to look to the federal government for meeting their claims, and thus strengthen the position of the government. Again, the power of the states to tax had been taken away, and the government should in justice pay what they owed at the time.

The measure was opposed by the South as an invasion of rights of the states, and as a measure to satisfy Northern speculators who had bought Southern bonds at low prices, anticipating the assumption and funding process. The New England states resorted to radical measures in support of the bill. Tied to this was the matter of locating the national capital. After a bitter contest, it was agreed that the bill should pass, and that the capital should be located on the banks of the Potomac, after a ten-year location in Philadelphia.

C. The report on excises. This report was presented on December 13, 1790. It proposed a tax on distilled liquors, chiefly to raise revenue to pay interest on the funded debt. Moreover, the power of the federal government would be felt all over the republic. Much of the spirits was made by farmers and pioneers in their homes. To prevent the invasion of their homes and stills by federal officers, a revolt took place among the inhabitants of certain districts of Virginia, Pennsylvania, and North Carolina. Washington, to prevent the nullification of the law, sent troops into these districts, and the "Whiskey Rebellion" collapsed.

D. The Bank of the United States. In a report to Congress, December 13, 1790, Hamilton proposed the establishment of a United States Bank. He argued that it would provide for the issue of stable currency; would be a medium for selling government bonds; would offer a safe and cheap means of exchange; and would be a safe place to care for government funds. Jefferson attacked the proposal on grounds of constitutionality, of its monopolistic character, and of its competition with state banks.

Washington favored Hamilton's proposal, and the bill was passed in 1791. It was created under the "general welfare clause," the charter to run for twenty years (1791–1811), with a capital stock of $10,000,000, the government to own two

millions of the stock. Three-fourths of the stock should be in new six per cent federal bonds, and one-fourth in specie. Paper money could be issued under certain conditions.

E. The Protective Tariff. Hamilton's celebrated *Report on Manufactures* was submitted December 5, 1791. It was, in effect, a suggestion that a protective tariff should be levied for the protection of American industries. It would, he declared, encourage the building of factories; create a home market for farm and plantation products; would double the security of the country in war-time by establishing its economic independence in times of peace; would provide labor for women and children, otherwise idle or working part-time; it would increase trade between the North and South, and through this contact, strengthen the Union and political ties.

This policy was adopted in part in 1792, and has become increasingly the policy of the United States as regards the tariff.

F. The opposition of Jefferson. The successful measures proposed by Hamilton met the determined opposition of Jefferson. He opposed the bank, the tariff, and Hamilton's financial measures generally. In 1794, Jefferson resigned as Secretary of State, and retired to assume the leadership of the growing opposition to the Federalistic régime, and to break down its effectiveness through political action. Hamilton believed that the country should be a great commercial and industrial nation. Jefferson feared industry, great riches, and their attendant evils. He believed the agricultural classes to be the foundation of the republic, and in time became the champion of individual rights against the interference of the government, and of the freedom of speech, of the press, and of public assembly. Between the two there was a wide gulf fixed, which could be bridged only by the action of the people through political means. In the years to come, the Constitution had to yield to the interpretations of one or the other of these great, but different, leaders.

III. The President and the Senate.

Washington held the view that the Senate was an advisory council to the executive, especially in the consideration of treaties and appointments. After failing to secure favorable action on a treaty presented and explained to the Senate in person by himself and the Attorney-General, he declared that

he would never visit the Senate again in person. At first a majority of the Senate were former members of the constitutional convention, and it rapidly assumed the rôle intended by that body. At the outset its meetings were secret.

IV. The Cabinet.

This was an extra-legal body, as the Constitution provided merely that the President shall consult the heads of departments. Washington adopted the practice of regarding the heads of departments as a collective body. Washington chose the following men as members of his Cabinet: Alexander Hamilton as Secretary of the Treasury; General Knox, head of the War Department; Edmund Randolph, Attorney General; and Thomas Jefferson, Secretary of State.

V. The veto power.

This power was not regarded in a narrow sense, but was exercised with the intent of the framers in mind, as a check upon the legislature.

VI. The Third Term doctrine.

Washington set the precedent for only two terms for the Presidency, but he did not believe in its strict application. The real author of the idea as a doctrine was Jefferson.

VII. The power of removal.

This question arose in the first Congress. The question was whether or not the Senate should intervene in the case of removals from office by the President. It became established that the power of removal was inherent in the President without the consent of the Senate.

VIII. Leading decisions of the Supreme Court on points of constitutional law during the Federalist regime.

A. Hayburn's Case, 1792 (2 Dallas, 409). Circuit judges under an act of Congress, were authorized to decide cases involving applications for petitions. The decisions of the circuit justices were subject to review by the Secretary of War and the Congress. The petition of one William Hayburn was received by the Pennsylvania circuit court, where the justices denied the petition and refused to act under the law. The court was of the opinion that the act conferred upon the courts

duties which were clearly non-judicial, and not included in the judicial power as described in the Constitution. Moreover, the independence of the judiciary, a cardinal principle with the framers of the Constitution, would be seriously impaired by a right of review conferred upon an executive officer or the legislature.

This is claimed by some authorities to be the first case where a court has declared an act of Congress unconstitutional.

B. United States v. *Yale Todd* (13 Howard, 52). Yale Todd instituted a suit under the same act of Congress in February, 1794. In a note appended to the case of United States v. Ferreira (13 Howard, 52), by the federal reporter, on authority of Chief Justice Taney, it appears that the Supreme Court held the act of 1792 unconstitutional on the ground that the power conferred by the act was not judicial power, and that the judges could not act as commissioners in administering the acts of Congress. According to writers on constitutional history and law, the decision of complete unconstitutionality was not made.

C. Vanhorne's Lessee v. *Dorrance* (2 Dallas, 304). The assembly of Pennsylvania passed what was known as the quieting and confirming act. It was claimed that the law interfered with the "natural, inherent, and inalienable right of private property." After a charge to the jury indicating the positions of the legislature and the courts under the Constitution, upholding a constitutional principle against a legislative act which impugns it, and commenting upon the sacredness of the right of private property as guaranteed by the Constitution, the jury was instructed by Justice Patterson to regard the Pennsylvania act as unconstitutional.

D. Hylton v. *United States* (3 Dallas, 171). The Supreme Court of the United States held that an act levying a tax on carriages was not a direct tax, and therefore not governed by the provision that direct taxes shall be apportioned among the several states according to numbers, and that no direct tax shall be laid except according to the enumeration provided for. The act was therefore held to be constitutional.

E. Calder v. *Bull* (3 Dallas, 386). In the year 1798, an effort was made to test the legality of a retroactive law of the Connecticut legislature. It was the opinion of the court that it had no jurisdiction of the question whether or not a law of the state legislature in conflict with the state constitu-

tion was void. The court declined to state whether or not the court could declare void an act of Congress in conflict with the Constitution of the United States. On the other hand, it was stated that a law would be declared void only in very clear cases.

F. Cooper v. *Telfair* (4 Dallas, 14). The legislature of the state of Georgia had passed several acts expelling certain men from the state and confiscating their property. The constitutionality of the statute was raised on appeal from the circuit court of the United States for the District of Georgia to the Supreme Court. It was claimed that the statutes were in conflict with the constitution of Georgia, and hence void. Both the circuit court and the Supreme Court refused to declare the laws invalid. The justices, while not taking a definite position on one side or the other, were generally of the opinion that the validity of laws should be generally presumed, unless the contrary is clearly shown.

The cases before the federal courts during the Federalist régime disclose a reluctance on the part of the justices to take a positive stand on the right of the courts to pass upon the constitutionality of laws of Congress, or of state laws. It remained for John Marshall to establish this principle as a definite practice of the American judicial system.

IX. The Virginia and Kentucky resolutions.

A. The Alien and Sedition Acts. These acts were passed soon after the election of John Adams as President. The Alien act authorized the President to expel from the country, or to imprison, any alien whom he regarded as dangerous, or had any reasonable grounds to suspect of "any treasonable or secret machinations against the government." The Sedition act was designed to punish those who attempted to incite unlawful combinations against the government, and those who wrote, uttered or published any false, scandalous, and malicious writing against the government of the United States or either House of Congress, or the President of the United States, with the intent to defame the government, or to bring one or all parts of the government into contempt or disrepute. The Alien act, while not enforced, offended the Irish and French, who opposed in the United States the policy of the government toward Great Britain. The Sedition act was enforced, with the result that there were a number of Republican

editors and campaign speakers jailed or heavily fined for caustic, though harmless, criticism of Adams and his Federalist policies.

B. The resolutions. Thomas Jefferson, sensing the discontent due to the Alien and Sedition Acts, drew up the following resolution, which was adopted by the Kentucky legislature and signed by the governor, in 1798:

"*Resolved,* That the several states comprising the United States of America are not united by the principle of unlimited submission to their general government, but that by compact under the style and title of a Constitution for the United States, and amendments thereto, they constituted a general government for special purposes, delegated to that government certain definite powers, reserving each state to itself the residuary mass of their right to their own self-government, and that whensoever the general government assumes undelegated powers, its acts are unauthoritative, void, and of no force; that to this compact each state acceded as a state, and is an integral party; that this government created by this compact was not made the exclusive or final judge of the extent of the powers delegated to itself; since that would have made its discretion, and not the Constitution, the measure of its powers; but that as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself, as well of infractions, as of the mode, as measure of redress."

In Virginia, Madison led a movement against the Alien and Sedition laws. The legislature passed resolutions declaring the acts unconstitutional, and asking the states to take proper means to protect the rights of the states and of the people.

C. The answers of the Federalists in other states. Other state legislatures to which these resolutions had been submitted, declared them as encouraging interference with the central government and that they should be discouraged. Rhode Island was of the opinion that the constitutionality of statutes should be tested by the federal courts exclusively, and by the Supreme Court finally. Massachusetts replied that the decision of cases arising under the Constitution and the construction of laws made in pursuance thereof were vested by the people in the federal courts. The answers in general were opposed to the resolution and favorable to the doctrine of judicial supremacy.

While the people, in the election of 1800, decided against the policy of such acts, the Supreme Court was to become in increasing degree the judge of the validity of acts of Congress, and not the states.

X. Foreign affairs.

During the Federalist régime, the foundations of American foreign policies were laid. Under Jefferson, as Secretary of State, the American policies of neutrality, non-intervention, and the *de facto* recognition of foreign states and governments were coincident with the first proclamation of neutrality, the reception of Edmund C. Genêt as Minister of the French Republic, and the refusal of this government either to suspend the treaties of alliance and commerce with France, or to go into the war on the side of France. While Jefferson sympathized with the aims of the revolution, he maintained a fair and strict neutrality. He did not, however, favor the commission of acts which France regarded as unfriendly. Hamilton sympathized with Great Britain, and urged the non-recognition of France, practically on grounds later championed by the Holy Alliance; the suspension of the treaties; and only a qualified reception of the French Minister, if any.

The resignation of Jefferson as Secretary of State gave the control of foreign affairs into the hands of the Federalists exclusively. The Jay treaty was negotiated with Great Britain, settling the points at issue over neutrality and neutral rights, and definitely fixing the status of the United States as a neutral in relation to the conflict. Certain points of dissatisfaction were not mentioned in the treaty. Jefferson declared the treaty to be an alliance between England and the Anglo-men in this country against the people and the legislature. The House of Representatives, hostile to the treaty, called upon the President for the papers dealing with the treaty negotiations. Washington refused, on the ground that the House had no share, under the Constitution, in the treaty-making power.

During the remainder of the Federalist régime and after, our foreign relations were concerned chiefly with the problem of protecting our neutral rights on the high seas.

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PART II

THE DEVELOPMENT OF THE AMERICAN CONSTITUTIONAL SYSTEM

CHAPTER XIX

MARSHALL'S GREAT DECISIONS: CONSTITUTIONAL LIMITATIONS ON THE STATES

I. Note on the life of John Marshall.

John Marshall, the son of Thomas and Mary Marshall, was born on September 24, 1755, in the southern part of what is now Fauquier County, Virginia, in a tiny log house. Thomas Marshall was "a man of the soil and the forests." Marshall said of his father: "My father, Thomas Marshall, was the eldest son of John Marshall, who intermarried with a Miss Markham, and whose parents migrated from Wales, and settled in the county of Westmoreland, Virginia, where my father was born." His mother, who was Mary Randolph Keith before her marriage, was well born and well educated. "My mother," wrote Marshall, "was named Mary Keith. She was the daughter of a clergyman, of the name of Keith, who migrated from Scotland and intermarried with a Miss Randolph, of James River."

John Marshall's early education was such as the frontier community in which he lived could afford. There were no schools within reasonable distance, so he was content with such teaching as his parents could give. The meagre fireside library was devoured by the eager youth. This was supplemented by the Lord Fairfax library. Later, he enjoyed the instruction of a young minister, James Thompson. When an American edition of Blackstone's commentaries was published, Marshall's father was one of the first subscribers. Thomas Marshall intended that his son should be a lawyer. He sent John to the "academy" of the Reverend Archibald Campbell, a sound, classical scholar, for a brief period.

Marshall had received careful military instruction from his father. When the Revolution broke out, he drilled the youths of his community, and later became a lieutenant in the line, and in 1776 was promoted to Captain-Lieutenant. He served with distinction in the following engagements: The Brandywine campaign, Germantown, Valley Forge, Monmouth,

Stony Point, and Pawles Hook. At Valley Forge, he was appointed deputy judge advocate in the Army of the United States. In this capacity he gained invaluable judicial experience.

In 1780, Marshall attended the law lectures of Professor George Wythe at William and Mary, for the short period of six weeks. He took an indifferent interest in the college debating society, and was elected a member of Phi Beta Kappa. His first academic interest was the law lectures, but his mind was constantly distracted from his first business by thoughts of his sweetheart, whose name he wrote in different places among his law notes. Bent on marriage, he left college, procured a license to practice law, signed by Thomas Jefferson, then Governor, and began his legal career. "In January, 1783," wrote Marshall, "I intermarried with Mary Willis Ambler, the second daughter of Mr. Jacquelin Ambler, then Treasurer of Virginia, who was the third son of Mr. Richard Ambler, a gentleman who had migrated from England, and settled at Yorktown, in Virginia."

Marshall's career at the bar and in the public service is fairly well known. He became an acknowledged leader of the Virginia bar, and served in the Virginia legislature and Council of State. As a member of the Virginia Convention on Ratification, he engaged Patrick Henry in debate, and aided in the ratification of the instrument which he, more than any other man, was destined to interpret and apply.

With the Constitution ratified, Marshall became the leader of the Virginia Federalists, and the defender of George Washington and his administration. He enjoyed by this time a lucrative practice. In 1797, he was appointed minister to France with C. C. Pinckney and Francis Dana. The outcome of this mission, commonly called the "X, Y, Z affair," did not distinguish Marshall as a negotiator, although he and Pinckney followed the only honorable course. He was elected a member of Congress in 1798, and entered upon his duties December 2, 1799. In Congress, he was a strong defender of John Adams and the Federalists. He was appointed Secretary of State, and served in this capacity for a brief period only. On January 20, 1801, he was nominated Chief Justice of the United States by President Adams, and was confirmed by the Senate on January 27. The seal of the United States was affixed to his commission by Samuel Dexter, Secretary of War,

as executing the office of Secretary of State *pro hac vice.* Marshall continued to serve as Secretary of State until the end of Adams' administration. On March 4, 1801, as Chief Justice of the United States, he administered the oath of office to his distinguished antagonist, Thomas Jefferson. What thoughts passed through their minds as they faced each other on this solemn and significant occasion, is known only to the Supreme Being. Certain approximate deductions might reasonably be drawn.

Probably the most brilliant contribution to American legal literature in a generation is the four volumes on *The Life of John Marshall,* by the Honorable Albert J. Beveridge. It should be read by every American citizen, not only for the light it sheds on the Constitution and the life of its greatest expounder, but also for an eloquent illustration of the rise of an American youth from comparative poverty to a position of high authority under a system of government which this master-builder so magnificently helped to mould.

II. Fletcher v. Peck (6 Cranch, 87).

This case involved the meaning of the contract clause: "No state shall . . . pass . . . any law impairing the obligation of contracts." This clause was inserted toward the end of the Convention. On August 28, 1787, King proposed a prohibition on the states interfering with private contracts. In the opinion of Madison, a general prohibition, rather than a specific one, should be laid on the states. Rutledge, of South Carolina, suggested a provision prohibiting retrospective laws. The Constitution was sent to the Committee of Style, without a provision on this point. When it was returned, it contained a prohibition on state legislatures to impair or alter contracts. The wording was slightly changed to its present form. One of the most important clauses was adopted in this manner with little debate.

Facts. In 1795, a land company secured from the Georgia legislature 45,000,000 acres of land for a consideration of $500,000. The contract for the purchase was in the form of a bill passed by the state legislature. It was claimed that the sale was effected through bribery, and the law was repealed by the state legislature. Peck, claiming title under the original grant, brought suit in the federal courts to uphold the contract of the state legislature.

Arguments. Counsel for the plaintiff made the following points:

1. The Georgia legislature had no right to sell the land.
2. The grant was void on account of fraud.
3. The state of Georgia rescinded the act.
4. The land belonged to the United States.

Counsel for the defendant set forth these points:

1. The state of Georgia had authority to sell the land.
2. Peck was innocent of any crime or wrong.
3. Peck was ignorant of any fraud in connection with the grant.
4. The land was owned by the state of Georgia.

Marshall's opinion and the decision of the court:

1. Is the legislature of Georgia competent to annihilate the title vested in Fletcher, and to resume the property? The principle that one legislature is competent to repeal any act which a former legislature was competent to pass, and that one legislature cannot abridge the rights of a succeeding one, is generally sound. But when a law is in its nature a contract, and when absolute rights have been vested under it, a repeal of the law cannot divest those rights. "The past cannot be recalled by the most absolute power."

2. What is a contract? Is a grant a contract? A contract is a compact between two or more parties, and may be executory, in which a party binds himself to do or not to do a particular thing, or executed, in which the object of contract is performed. A grant has the same elements, and in its own nature amounts to the extinguishment of the right of the grantor, and implies a contract not to reassert that right. One is, therefore, estopped by his own grant.

3. Does a grant come within the meaning, and this case within the scope of the provision of the Constitution that no state shall pass any law impairing the obligation of contracts? A grant being a contract executed, and the words of the Constitution being general, and hence making no distinction as to kinds of contracts, is within the meaning of the provision.

4. If grants are comprehended under the term contracts, is a grant from the state excluded from the operation of the provision? The general terms being used, contracts of all descriptions are embraced, including grants made by the state, and to which it is a party. "Whatever respect might have been felt for the state sovereignties, it is not to be dis-

guised that the framers of the Constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed."

5. Does the rescinding act have the effect of an *ex post facto* law? Yes, because it forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he purchased.

6. Does the case come under the operation of the "impairment of contract" clause? The state of Georgia was restrained from passing a law impairing the purchase of the land, since the estate passed into the hands of the purchaser for a valuable consideration, and without notice of fraud.

III. Dartmouth College v. Woodward (4 Wheaton, 518).

Facts. In 1769, one Rev. Eleazer Wheelock, having organized a school for religious instruction among the Indians, and desiring to establish in New Hampshire an institution to promote learning among the English, applied to the Crown for a charter, which was granted, incorporating the twelve persons mentioned therein by the name of "The Trustees of Dartmouth College," and granting to them and their successors the usual corporate privileges and powers, and authorizing the trustees, the governing board of the college, to fill all vacancies which might take place in their own body.

Under three different acts of the New Hampshire legislature, the charter was altered. The act of June 27, 1816, entitled, "An act to amend the charter and enlarge and improve the corporation of Dartmouth College," increased the number of trustees to twenty-one, gave the appointment of additional trustees to the governor, and created a board of overseers, consisting of twenty-five persons, with power to inspect and control the most important acts of the trustees. Certain state officials of New Hampshire and Vermont were made members ex-officio. Other members were to be chosen by the Governor and Council of New Hampshire, who were to fill all vacancies as they occurred.

The majority of the trustees having refused to accept the amended charter, brought suit for the corporate property held

by Woodward under the acts of the New Hampshire legislature. The Superior Court of Judicature of New Hampshire rendered a verdict for the defendant, which judgment was brought before the Supreme Court by writ of error.

Decision of the court, and Marshall's opinion:

1. Is the charter a contract? In this transaction, every ingredient of a complete and legitimate contract is found. A charter is applied for, having as its object the incorporation of a religious and literary institution. It is therein declared that upon the creation of the institution large contributions will be made. The charter is granted, and on its faith the property is conveyed.

2. Is this contract protected by the Constitution of the United States?

a. The provision in the Constitution is understood to embrace only such contracts as respect property or some object of value, and confer rights which may be asserted in a court of justice. The term " contract " must therefore be interpreted in the more limited sense, and must be confined to cases within the mischief it was intended to remedy. It does not comprehend the political relations between the government and its citizens, public officials, and laws generally, which are subject to constant mutation.

b. Is the act of incorporation a grant of political power, creating a civil institution employed in the administration of government? Are the funds of the college public property? Is the government of New Hampshire alone responsible for the institution?

Or is the college a private eleemosynary institution, having the power to take property for private purposes, and to accept funds from donors who have themselves stipulated their future disposition and management?

It is a private and not a public institution:

1. As regards the source of its funds. Its foundation is purely private and eleemosynary, because its funds consisted entirely of private donations.

2. As regards the objects to which the funds are applied. Money may be given to education under private foundations, and trustees and professors employed in its administration are not public officers.

3. As regards the act of incorporation. Private corporations, artificial beings existing only in contemplation of law,

are clothed with such properties as will best effect the object of their creation. The leading properties are immortality and individuality. This does not confer upon it political power or a political character. Its existence, powers, and capacities having been authorized by the state, it does not clothe the state with the power to change the form of property which it has authorized to be acquired, or to vary the purposes to which the property is applied.

4. As regards those for whose benefit the property donated was secured. The objects of the contributors and the incorporating act were the promotion of Christianity and education generally. The beneficial interest is not in the people of New Hampshire.

5. As regards the interests of original parties to the contract, and the potential right of beneficiaries. The original parties to the contract were the donors, the trustees, and the crown (to whose rights and obligations New Hampshire succeeds). Their interests, together with those of past, present and future students, can only be protected by the board of trustees, which alone is empowered to act. This is a contract to which the parties have a vested beneficial interest and to which the protection of the Constitution of the United States is extended.

c. Has the obligation of the contract been impaired by the acts of the New Hampshire legislature complained of? Under these acts, the power of government of the college is transferred from the board of trustees to the state executive; the management and application of the funds of the institution, placed by the donors in trustees named in the charter, is given to the government of the state. It is reorganized and changed from a literary institution under the control of private literary men into a machine subject absolutely to the will of government. "It is not according to the will of the donors, and is subversive of that contract on the faith of which their property was given."

IV. Sturges v. Crowninshield (4 Wheaton, 117).

This case involved the bankruptcy and contract clauses. The Constitution provides that Congress shall have power to establish "uniform laws on the subject of bankruptcies throughout the United States." There was no federal bankruptcy law until 1800. Its authorship is ascribed to John Marshall. It did not work well, so it was repealed in 1803,

Another act was passed in 1841 and repealed in 1843, and still another was passed in 1867 and repealed in 1878. The present law was passed in 1898. The English bankruptcy laws in force at the time of the adoption of the Constitution applied to merchants and traders only. "Insolvency" laws governed proceedings under which debtors were authorized to surrender their property for the benefit of creditors, and thus secure a discharge. The Supreme Court has not observed this distinction.

State legislatures are forbidden to pass *ex post facto* laws which, according to Marshall, is a law "which renders an act punishable in a manner in which it was not punishable when it was committed." What was the intent of the Convention with respect to the *ex post facto* clause? Did it apply to civil as well as criminal laws? Dickinson called attention to the fact that according to Blackstone, *ex post facto* referred to criminal cases. The Convention took no action on this point. It appears, on the whole, that the intent of the Convention was to refer to both civil and criminal cases.

Facts. Certain notes were made prior to the enactment of the bankruptcy law. The notes fell due, and suit was instituted for their collection. A state bankruptcy law had been passed in New York, by which the debtor was discharged of his debt. It was claimed that the New York law operated to impair the contract.

Arguments. The following arguments were made for the state law:

1. The bankruptcy law affirms the contract.

2. Religion is part of the common law, and imposes the obligation to protect the poor.

3. The intention of the framers of the Constitution must be looked to. The contract clause was intended for those who evaded obligations.

4. The question was not a political, but a moral one.

The decision of the court (John Marshall):

1. The states have power to pass bankruptcy laws in the absence of conflicting congressional legislation.

2. State laws which attempt to make transactions usurious and void which were not so when entered into are unconstitutional.

3. A state law which provides for discharging insolvent persons from debts contracted before the passage of the act is likewise unconstitutional.

4. The purpose of the members of the Constitutional Convention was to restore public confidence in private transactions by providing for their efficacy and enforcement.

5. The law of the state of New York operated to impair the contract, and was therefore void.

V. Ogden v. Saunders (12 Wheaton, 213).

In this case, Chief Justice Marshall gave his only dissenting opinion on a constitutional question. In thirty-four years' service on the bench he dissented only eight times. Of the 1,106 opinions delivered by the court during his service, the Chief Justice wrote 519.

Facts. Ogden, a citizen of New York, accepted there certain bills of exchange which in 1806 were drawn upon him in Kentucky, and which passed into the possession of Saunders, who was a citizen of Kentucky. Later, Ogden became a citizen of Louisiana, and was sued in assumpsit upon the bills in the United States District Court for Louisiana. Ogden claimed a discharge in bankruptcy in New York, under a statute passed there in 1801. The case came before the Supreme Court on writ of error.

Arguments. Attorneys for the plaintiff were Webster and Wheaton. Wirt appeared for the defendant.

Wheaton: 1. This contract is a natural contract. Nature is not law.

2. The law is prospective in its application.

Webster: 1. The law is not a part of the contract, for what would become of the contract if the law were repealed?

2. The contract clause is a great political measure designed to protect business transactions.

Wirt: 1. The contract must be dependent upon the state law.

2. Historical reasons concur to support this proposition.

3. Other laws have impaired the obligation of contracts, and have not been held unconstitutional.

Decision of the court. The judges in 1824 were Marshall, Washington, Livingston, and Story, who were Federalists; Todd and Duval, who were Jeffersonians; and Johnson. Thompson was appointed in 1823. There was apparently a deadlock in the case in 1824, and the court remained divided by accident until 1827, when the decision was made. Five opinions were given in the case.

Washington. 1. The municipal law of the state where the contract is made must govern the contract throughout, whenever its performance is sought to be enforced. It forms a part of the contract and of its obligation, and being a part of the obligation, cannot impair it.

2. The municipal law of the state, which controls the validity, construction, performance, remedy, evidence, and discharge of the contract, is paramount to the common law of all civilized nations, where the two conflict.

3. Laws passed regulating the validity, construction, and discharge of contracts, operating retrospectively, are generally held void, while those operating prospectively are sustained. One discharges the debtor and all his future acquisitions from the contract; while under the other the debtor surrenders everything he possesses towards the discharge of his obligation.

Thompson. If Congress can pass bankruptcy laws, why cannot the states do so?

Trimble. The law is a part of the contract.

Johnson. 1. The law is not a part of the contract, but the parties know their remedies under the law.

2. The law is constitutional.

Marshall. (Dissenting opinion for himself, and Justices Duval and Story.)

1. The law cannot be a part of the contract, because it gives to the legislature too much power.

2. If one law enters into all subsequent contracts, so does every other law which relates to the subject.

3. The legislature may change the remedy, but not the essence of the contract.

4. It is against public policy and against the intent of the framers of the Constitution to allow a discharge in bankruptcy under a state law when the creditor is the resident of another state.

It was the view of Marshall that the obligation of the contract was within the contract. The others held that the obligation was in the law. Thus, Marshall believed, a contract was a mystical thing, outside the domain of law. The mystic phrase is "due process," the object of which is to enthrone private rights. This case was Marshall's one great defeat. The decision was revolutionary, and made inevitable the fourteenth amendment to the Constitution.

Johnson, in affirming for the majority the judgment of the

lower court after the reorganization of the Supreme Court (Washington, Thompson and Trimble dissenting), declared that a discharge of bankruptcy by the laws of a state, as between citizens of the same state, is valid as it affects posterior contracts; that as against creditors, citizens of other states, it is invalid as to all contracts. He stated the following propositions:

1. That the power given to the United States to pass bankrupt laws is not exclusive.

2. That the fair and ordinary exercise of that power by the states does not necessarily involve a violation of the obligation of contracts, *multo fortiori* of posterior contracts.

3. When the states act upon the rights of citizens of other states, a conflict arises with the judicial powers granted to the United States which renders the exercise of such a power incompatible with the rights of other states, and with the Constitution of the United States.

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CHAPTER XX

MARSHALL'S GREAT DECISIONS: INTERPRETATION OF THE GENERAL SCOPE OF FEDERAL POWERS

I. McCulloch v. Maryland (4 Wheaton, 316).

Facts. The Bank of the United States was incorporated by Congress in 1816. The next year a branch of this bank was established at Baltimore. In the year 1818, the Maryland legislature passed a law requiring all banks in the state not chartered by the state legislature to pay a stamp tax on their note issues. McCulloch, the cashier of the Baltimore branch, was held liable by the state courts for violating this statute. The case was taken to the Supreme Court of the United States on writ of error.

Decision of the court. There are two aspects to this case: that of interpreting federal powers; and, that of limiting the authority of the states.

1. Has Congress power to incorporate a bank?

a. "The government of the Union, then (whatever may be the influence of this fact on the case) is emphatically and truly a government of the people. In form and in substance it emanates from them, its powers are granted by them, and are to be exercised directly on them, for their benefit."

b. The government of the United States is one of enumerated, and therefore limited, powers, but is supreme within its sphere of action, and must, within this sphere, bind its component parts.

c. The establishment of a bank or the creation of a corporation does not appear among the enumerated powers, but no phrase excludes incidental or implied powers, nor is an express and minute description of powers required. The extent of the powers of Congress is nowhere defined, and they are virtually unlimited.

d. It is a constitution that is being expounded, and from the point of view of the general scope of federal powers granted by it, the instrument must be viewed as a whole.

e. Under the provision that Congress shall make "all laws

necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this Constitution, in the government of the United States, or in any department thereof," Congress may provide for the execution of those great powers on which the welfare of a nation essentially depends, because: (1) the clause is placed among the powers of Congress, not among the limitations on those powers; and (2) its terms purport to enlarge, not to diminish, the powers vested in the government. The bank is therefore a needful function of government.

"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

2. Has Maryland the power to tax the local United States branch bank? While this act is not prohibited by any express provision, it was disclosed in the first part of the opinion, and may be regarded as axiomatic in this, that "the Constitution and the laws made in pursuance thereof" are supreme; that they control the Constitutions and laws of the respective states, and cannot be controlled by them. From this general principle, the following corollaries are deduced:

a. That the power to create implies a power to preserve.

b. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with, these powers to create and to preserve.

c. That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create.

d. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme.

e. That this is a tax on the operations of the bank, and is, consequently, a tax on the operations of an instrument employed by the government of the Union to carry its powers into execution, and must be unconstitutional.

II. Gibbons v. Ogden (9 Wheaton, 1).

This is the first case involving the power of Congress over interstate commerce. It was agreed without serious discussion to vest in the national government the control of foreign

and interstate commerce. This was due to trade discriminations and other abuses which under the Articles had rendered the commercial situation intolerable. The Committee of Detail suggested that Congress be empowered " to regulate commerce with foreign nations and among the several states." This was agreed to. The committee to which the matter of Indian affairs was referred, suggested the addition of the words " and with Indian tribes." This was adopted, and in this form the clause was reported by the Committee of Style.

Facts. A statute passed by the New York legislature granted to Fulton and Livingston the exclusive right to navigate the waters of that state for a period of years. Fulton assigned to Ogden the right to navigate between New York City and places in New Jersey. Ogden secured an injunction in the state court against Gibbons, who was operating two steamboats between New York and New Jersey, enrolled and licensed in the coasting trade under the act of Congress of 1793.

Decision of the court.

1. The so-called principle of " strict construction " of the last of enumerated powers, authorizing Congress " to make all laws which shall be necessary and proper " for carrying its powers into execution, cannot be used to " cripple the government and render it unequal to the objects for which it is declared to be instituted, and to the powers given, as fairly understood, render it competent. . . . "

2. What is commerce? It is not only traffic, buying and selling, and the interchange of commodities. It is intercourse, and as such, includes navigation and its regulation as if the word navigation had been added to the word " commerce."

3. To what commerce does this power extend? " With foreign nations, and among the several states, and with the Indian tribes." It comprehends every species of commercial intercourse between the United States and foreign nations. The commerce with Indian tribes, at the time of making the Constitution, was essentially within a state.

The completely internal commerce of a state is reserved for the state itself.

The term " among " means intermingled with, and is restricted to that commerce which concerns more states than one. " The power of Congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several states."

4. What is this power? "It is the power to regulate; that is, to prescribe the rule by which Congress is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution."

5. Can a state regulate commerce with foreign nations and among the states while Congress is regulating it? While the states and the Congress may use the same means in the exercise of their acknowledged respective powers, yet the same measures flow from distinct powers. A license to carry on the coasting trade means authority to do so, and a law inconsistent with that license granted by act of Congress is unconstitutional.

III. American Insurance Company v. Canter (1 Peters, 511).

This case involved the validity of the tribunal established at Key West, including the legal relation in which that territory and government stood to the United States, and the treaty and war-making powers. The specific question was whether or not admiralty jurisdiction in the territory of Florida might be exercised by courts whose judges were appointed for terms of four years. The Constitution vests "the judicial power of the United States" in "one Supreme Court and such inferior courts as the Congress may from time to time establish. The judges both of the Supreme and inferior courts shall hold office during good behavior. . . ."

Decision of the court.

1. "The Constitution confers absolutely on the government of the Union the powers of making war, and of making treaties; consequently that government possesses the power of acquiring territory, either by conquest or by treaty.

2. The judicial clause of the Constitution does not apply to Florida.

3. The judges of the superior courts of Florida hold office for four years.

4. "These courts are not, then, constitutional courts in which the judicial power conferred by the Constitution on the general government can be deposited."

5. "They are legislative courts, created in virtue of the general right of sovereignty which exists in the government," or by virtue of the territorial clause of the Constitution.

6. " The right to govern may be the inevitable consequence of the right to acquire territory."

7. The jurisdiction with which these legislative courts are invested is not a part of the judicial power of the Constitution, but is conferred by Congress in the exercise of those general powers which the Congress possesses over the territories of the United States.

8. In legislating for the territories, the Congress exercises the combined powers of the general and of a state government.

9. The act of the territorial legislature creating the court in question was held not to be inconsistent with the laws and Constitution of the United States.

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CHAPTER XXI

THE POWER OF THE SUPREME COURT TO SET ASIDE ACTS OF CONGRESS

I. Marbury v. Madison (1 Cranch, 137).

Facts. William Marbury had been appointed justice of the peace in the District of Columbia. The appointment had been confirmed, and the commission was signed and sealed, but President Jefferson instructed that the papers should not be delivered. Marbury sought from the Supreme Court a writ of mandamus to Secretary Madison, who had refused to deliver the commission.

Decision of the court.

1. Has the applicant a right to the commission he demands? The court answered in the affirmative.

2. If he has a right, and that right has been violated, do the laws of his country afford him a remedy? It was held that a remedy is afforded by the laws.

3. Is he entitled to the remedy for which he applies? This depends on the nature of the writ applied for, and the power of the court. The Judiciary Act of 1789 authorized the Supreme Court "to issue writs of mandamus . . . to any courts appointed or persons holding office under the authority of the United States." The power to issue such a writ is not within the original jurisdiction of the Supreme Court as defined under article III, section 2, paragraph 2 of the Constitution. An act of Congress conferring original jurisdiction in cases not enumerated in the Constitution is repugnant to the instrument.

4. Can a jurisdiction conferred by Congress, not warranted by the Constitution, be exercised? May an act repugnant to the Constitution become the law of the land?

a. The people have an original right to establish their fundamental principles of government. Acts emanating from the people are supreme, and the rules established by them permanent.

b. "This original and supreme will organizes the govern-

ment, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments."

c. Our government is one with limited powers. Legislative powers are defined and limited, and to make them more definite and effective, the Constitution is written.

d. If constitutional limits may at any time be passed by those intended to be restrained, then the doctrine of constitutional limitations is ridiculous. If an act of the legislature is on a level with the Constitution, "then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable."

e. If an act of the legislature, repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect?

1. "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret the rule. If two laws conflict with each other, the courts must decide on the operation of each."

2. If a law and the Constitution apply to a particular case, the court must decide between them. If, therefore, the courts are to regard the Constitution, and if it is superior to ordinary legislative acts, the Constitution, and not the ordinary act, must govern the case to which both apply.

3. An examination of many sections of the Constitution indicates that the framers intended "that instrument as a rule for the government of courts, as well as of the legislature."

4. Judges take an oath, imposed by the legislature, to discharge their duties agreeably to the Constitution of the United States.

5. The Constitution is first mentioned in declaring what shall be the supreme law of the land. Moreover, only laws which shall be made in pursuance of the Constitution come within this category.

6. "Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void; and that courts, as well as other departments, are bound by that instrument."

READING

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CHAPTER XXII

CONFLICTS OVER THE POWER OF THE JUDICIARY DURING THE FIRST QUARTER OF THE NINETEENTH CENTURY

I. Chisholm v. Georgia (2 Dallas, 419).

This was one of the earliest suits under the Constitution. Chisholm attempted to collect an old debt of the Revolution. The case involved the question whether or not a state could be sued by a private citizen. It was contended that the Supreme Court could not take jurisdiction in an action by a citizen against a state. The Georgia House of Representatives passed a resolution forbidding the execution of judgments of federal courts in the state of Georgia by federal officials.

The Supreme Court, however, assumed jurisdiction, and directed that papers be served on the governor and attorney-general of the state. Moreover, unless the state appeared to defend, it was ordered that judgment should be entered by default.

This decision of the court caused widespread protest, especially among those who opposed the growing power of the judiciary, and who championed state's rights. An act was passed by the House of Representatives of Georgia declaring that any official attempting to enforce the decision should be declared guilty of a felony and suffer death without benefit of clergy, by being hanged. The Massachusetts legislature regarded this power of the court as dangerous to the peace, safety, and independence of the several states and repugnant to the first principles of the federal government. Two days after the decision was reached (February 20, 1793), the eleventh amendment to the Constitution was proposed by Senator Sedgwick, of Massachusetts. It was proposed by Congress in 1794, and ratified in 1798. It provides that

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

It was not intended by the framers of the Constitution that the federal judiciary should be authorized to entertain suits by individuals against states. In fact, such an intent was clearly denied. Hamilton, writing in the *Federalist,* and Madison and Marshall, in the Virginia convention of ratification, all expressed opinions to the contrary.

In a later case (*Hollingsworth* v. *Virginia,* 3 Dallas, 378), the Supreme Court unanimously declared, " that, the amendment being constitutionally adopted, there could not be exercised any jurisdiction, in any case, past or future, in which a state was sued by the citizens of another state, or by citizens or subjects of any foreign state." This was understood as superseding all suits instituted previously to the adoption of the amendment as well as preventing the institution of new suits. In the case of *Hans* v. *Louisiana* (134 U. S., 1), it was held that the State of Louisiana could not be sued by one of its citizens, even where the case involved a federal question other than the character of the parties, and even if the prohibition of the eleventh amendment did not in express terms apply to citizens of the state being sued.

Mr. Justice Iredell, in his dissenting opinion in the case of *Chisholm* v. *Georgia,* declared that it was not intended to create new and unheard of remedies, by subjecting sovereign states to actions at the suit of individuals, but only by proper legislation to invest the federal courts with jurisdiction to hear and determine controversies and cases, between the parties designated, that were properly susceptible of litigation in courts.

II. Repeal of the Judiciary Act and the Impeachment of Justice Chase.

The succession of Marshall to the Chief Justiceship and of Jefferson to the Presidency, was the beginning of a long and bitter contest between Republican and Federalist principles. Each group had its own constitutional doctrines, and attempted, through political action, to make its views prevail. The appointment of Marshall by John Adams, upon the resignation of Ellsworth, forestalled the appointment of Judge Spencer Sloane by Thomas Jefferson. Moreover, it placed the ablest and foremost Federalist of his day in an impregnable position, where, for more than a third of a century he moulded the constitutional doctrines and practices of the

country, withstood the attacks of the states against the federal system, of the legislature and the executive against the courts and championed the principles of judicial supremacy and independence against a determined opposition.

In 1801, a law was passed creating sixteen new circuit judgeships, and reorganizing the judicial system with the sole purpose of filling the courts with judges having Federalist sympathies. Adams immediately proceeded to appoint Federalists to these positions at the close of his term. In a letter to Mrs. John Adams, Jefferson complained of Adams' appointments as unkind, as the appointees were his ardent political enemies, and he was forced, either to deal through men who would deliberately defeat his views, or incur the odium of displacing them. "It seemed but common justice," he declared, "to leave a successor free to act by instruments of his own choice." The matter was referred to in Jefferson's first annual message to Congress. The law was repealed in 1802.

Justice Chase was angered by the opposition to Federalist principles. He was especially aroused over the repeal of the judiciary act, the extension of suffrage in Maryland, and the victory of Jefferson. So much was he nettled, that in a charge to a grand jury, he made the following statement:

> You know, gentlemen, that our state and national institutions were framed to secure to every member of the society equal liberty and equal rights; but the late alterations of the federal judiciary by the abolition of the office of sixteen circuit judges, and the recent change in our State constitution, by the establishment of universal suffrage, and the further alteration that is contemplated in our State judiciary (if adopted) will, in my judgment, take away all security for property and personal liberty. The independence of the national judiciary is already shaken to its foundation, and the virtue of the people alone can restore it. The independence of the judges of this state will be entirely destroyed if the bill for the abolition of the two supreme courts should be ratified by the next general assembly. The change of the State Constitution, by allowing universal suffrage, will, in my opinion, certainly and rapidly destroy all protection to property, and all security to personal liberty, and our republican Constitution will sink into a mobocracy, the worst of all possible governments.

Jefferson was of the opinion that Justice Chase should be punished for this indiscretion. The House of Representatives impeached him, but the trial was conducted mainly along

party lines, and disclosed no criminal actions on the part of the judge. The impeachment strengthened rather than weakened the judiciary, and discouraged use of the power of impeachment as a weapon to control the courts.

III. United States v. Peters (5 Cranch, 115).

One Gideon Olmsted and others from the state of Connecticut were captured by the British and put to work on the British boat "Active" as prisoners of war. The prisoners seized the boat and sailed for Egg Harbor, where the boat was captured by a Pennsylvania warship. In 1778, the Admiralty court of Pennsylvania condemned it as prize and awarded it to the Pennsylvania captors. Olmsted and associates carried the case on appeal to the Court of Appeals instituted by Congress, which court awarded the boat to the original captors (Olmsted and party). The marshal of the court was directed to sell the boat and turn the proceeds over to Olmsted, but he paid the money to Judge Ross of the Pennsylvania Admiralty Court, who in turn gave it to the state treasurer of Pennsylvania. After the treasurer's death, Olmsted and party brought suit against the executors in the United States District Court, and obtained judgment. Judge Peters of the District Court refused to allow Olmsted an attachment. In 1809 a writ of mandamus was sought from the Supreme Court directing Judge Peters to issue the attachment in obedience to the sentence of the District Court. Judge Peters set up as a reason for not taking action, a state statute passed subsequent to the admiralty proceedings, directing the governor to demand the funds sought in the proceedings, and to use any means necessary to protect such funds from process issuing out of the federal court. The Supreme Court held that the federal court had jurisdiction in the original proceeding; that the Supreme Court had jurisdiction to entertain the mandamus proceeding; and that the "act of Pennsylvania, with whatever respect it may be considered, cannot be permitted to prejudice the question." The Court decided that the funds should be turned over to Olmsted and associates.

The state refused to pay the money, and the governor called out the militia to resist the execution of the attachment. Moreover, the legislature resolved that there was no impartial tribunal to pass on conflicts between the state and

the nation, and proposed an amendment to remedy this alleged defect. Virginia replied to the proposal, taking a position contrary to the Virginia resolutions of 1798. Eventually the state militia officers were arrested and fined and the order enforced. The state was beaten.

IV. Cohens v. Virginia (6 Wheaton, 264).

This is the great Lottery case. Virginia had passed a law forbidding lotteries. The City of Washington had organized a lottery. Cohens sold lottery tickets in the state of Virginia. The result was a conflict of these laws.

Questions, and the decision of the court.

1. Can the corporation of Washington or the federal government pass a law overriding a state law? The act of Congress was not intended to give the corporation of Washington the authority of controlling the laws of states within the states themselves, as claimed by the lottery law. However, Congress might authorize a corporation of the Federal District to exercise legislation within a state, taking precedence of the laws of the state.

2. Does an appeal lie from the state courts to the United States courts? This was decided in the affirmative.

3. When the state is a party, is there appellate jurisdiction on the part of the federal courts? It was held by Marshall and the court that when a state brings suit in a state court against an individual and gets judgment, an appeal in such action may be taken by the defendant to the Supreme Court on constitutional points. Thus, in spite of the eleventh amendment, a state can be brought as a defendant to the bar of the Supreme Court.

Judge Roane of Virginia declared that the federal judiciary "claims the right not only to control the operations of the coördinate departments of the government, but also to settle exclusively the chartered rights of the states." Jefferson regarded the opinion in the main as extra-judicial, and criticised Marshall for his practice of stating what the law would be in a moot case not before the court. In regard to Roane's activities against him, Marshall declared: "There is on the subject no such thing as a free press in Virginia and of consequence the calumnies and misrepresentations of this gentleman will remain uncontradicted and will by many be believed to be true. He will be supposed to be the champion of state

rights, instead of being what he really is — the champion of dismemberment." He expressed surprise that Madison had embraced the views of Jefferson as to the judiciary, and remarked: "In Virginia, the tendency of things verges rapidly to the destruction of the government and the reëstablishment of a league of states."

V. Osborne v. President, etc., of the Bank of the United States (9 Wheaton, 738).

The state of Ohio levied a tax on each branch bank of $50,000. Officers of the bank refused to pay the tax, and the state officials collected it by force. The Bank of the United States, chartered by Congress, brought suit in the federal circuit court for Ohio, as authorized by its charter, to recover the funds collected, and to restrain Osborne and others, officers of the state of Ohio, from collecting the tax. The state officials appealed to the Supreme Court from a decree against them.

The Ohio legislature passed resolutions covering the following points:

1. Denial of the exclusive jurisdiction of the Supreme Court to pass upon constitutional questions.
2. Citing the eleventh amendment.
3. Endorsing the doctrines of the Virginia and Kentucky resolutions, and pointing to the election of 1800 as a vindication.
4. Declared that Ohio did not have to acquiesce in the decision of the case of *McCulloch* v. *Maryland.*
5. Threatened the withdrawal of protection to the bank.

Decision of Marshall and of the court.

1. The Constitution declares that the judicial power shall extend to all cases in law and equity arising under the Constitution, laws, and treaties of the United States.
2. The judicial department is therefore authorized to receive jurisdiction to the full extent of the Constitution, laws and treaties of the United States when the subject becomes a case (*i.e.,* when the subject is submitted to it by a party who asserts his rights in the form prescribed by law).
3. The Supreme Court has original jurisdiction over cases affecting ambassadors, other public ministers, and consuls and cases in which a state may be a party, and cannot be exercised in its appellate form. In all other cases, the power may

be exercised in its original or appellate form, or both, as Congress may determine.

4. Excepting the cases of original jurisdiction conferred upon the Supreme Court, no cases exist to which the judicial power extends, from which the original jurisdiction of the inferior courts is excluded by the Constitution. Original jurisdiction, so far as the Constitution gives a rule, is coextensive with the judicial power.

5. Congress can give the circuit courts original jurisdiction in any case to which the appellate jurisdiction of the Supreme Court extends.

6. The fact that several questions arise depending upon the general principles of law rather than a law of the United States, does not oust jurisdiction or establish that the case does not arise under the law of the United States.

7. The clause giving the bank the right to sue in the circuit courts of the United States arises under the law of Congress regulating judicial power, and is constitutional.

Jackson attacked the bank in a special message to the Congress. In spite of this, Congress passed a bill providing that the corporation be rechartered. In his veto message he declared that he could not assent to the conclusion that the constitutionality of the bank should be considered as settled by the decision of the court. He wrote:

> If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the coordinate authorities of this government. The Congress, the executive, and the court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, or the Senate, and of the President, to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval, as it is of the Supreme Court, when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges; and, on that point, the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.

READING

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HAINES. *The American Doctrine of Judicial Supremacy,* pp. 200–246.
WARREN. *The Supreme Court in United States History,* Vol. I, pp. 93–102, 269–297, 375–376, 529–540; Vol. II. pp. 1–24, 88–92, 117–119.
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CHAPTER XXIII

THE SUPREME COURT AND STATES RIGHTS, UNDER CHIEF JUSTICE ROGER B. TANEY

I. The advent of Taney as Chief Justice.

Roger B. Taney was born in Maryland in 1777, of Virginia planter ancestry. He was of the Catholic faith. He was educated at Dickinson College. At first he was a Federalist, but turned to the Jeffersonian party and principles after the war of 1812. He was Attorney-General under Jackson in 1831, and in time became Jackson's chief adviser. As Secretary of the Treasury he advised the removal of bank deposits. The Senate having refused to confirm his nomination, he resigned. He was first appointed as associate justice of the Supreme Court in 1834, but the Senate refused its confirmation. Upon Marshall's death, he was appointed Chief Justice of the United States. He was, in general, a believer in the principles of the democratic party, and it was the intent of the appointing authority to neutralize the influence of Marshall by placing at the head of the court a states rights man who belonged to the school which Marshall called "strict" or "narrow constructionists." For nearly thirty years, Taney's influence as Chief Justice was felt.

The court under Taney was constituted as follows: Trimble, Kentucky (1826); McLean, Ohio (1829); Baldwin, Virginia (1830); Wayne, Georgia (1835); Taney, Maryland (1836); Barbour, Virginia (1836); Catron, Tennessee (1837); McKinley, Alabama (1837); Daniel, Virginia (1841).

Thus the court was reconstituted with men of Southern and democratic sentiments much as it was reorganized at the end of John Adams' administration with men of Federalist principles.

II. Briscoe v. Bank of Kentucky (11 Peters, 257).

Craig v. *Missouri* (4 Peters, 410) is the background for this case. These cases illustrate the struggle of the West for control through the extension of credit. In order to supply

itself with credit, the Missouri legislature authorized the issuance of paper money. This case involves the validity of this act. Craig borrowed money from the state under the act, and refused to pay.

Benton, counsel for Missouri, maintained that the certificates issued by the state were not money, but the same as "wolf-scalp" money. Marshall was not satisfied with this argument. He asked: "What is a bill of credit?" In his opinion, it was paper intended to circulate on the faith of the state, redeemable at a future date. This, he said, was forbidden by the Constitution, and the law was declared null and void. Three justices dissented, arguing that the state merely promised to receive the certificates in payment.

The state of Kentucky decided to resort to the expedient of organizing the Bank of Kentucky. The stock was subscribed by the state, consisting of money paid for state lands. A president and twelve directors were to be chosen by the legislature. The bank was authorized to issue notes payable to bearer, *i.e.*, the bank and not the state. The case of *Briscoe* v. *the Bank of Kentucky* came before Marshall in 1834. There were only four justices on the bench, and Marshall was unable to effect an agreement. In postponing this case and that of *City of New York* v. *Wilson* (11 Peters, 102), he remarked:

> The practice of this court is not (except in cases of absolute necessity) to deliver any judgment in cases where constitutional questions are involved, unless four judges concur in the opinion, thus making the decision a majority of the whole court. In the present case four judges do not concur in the opinion as to the constitutional question which has been argued. The court, therefore, directs these cases to be reargued at the next term, under the expectation that a larger number of the judges may then be present.

In the meantime, Taney had become Chief Justice. The opinion in *Briscoe* v. *the Bank of Kentucky* was given by Justice McLean, who held that the bills were not issued by the state but by the bank, and that the prohibition in the Constitution against the issue of bills of credit by a state does not forbid the issue of circulating notes by a state chartered corporation, even though the state owns all the stock therein. Justice Story strongly dissented.

The effect of this decision was immediate. States began

to charter banks to issue money. It was practically a return to the monetary system under the Articles, and amounted to a complete undoing of the Constitutional monetary system.

III. Charles River v. Warren Bridge (11 Peters, 420).

In 1650 the legislature of Massachusetts granted certain ferry rights to Harvard College. In 1785 the legislature authorized "the Proprietors of the Charles River Bridge" to erect a bridge between Charlestown and Boston in place of what was then a ferry, and to take tolls for its use. The charter was to run for forty years and for this period the company was to pay £200 annually to Harvard College, owner of the ferry. In 1786 the bridge was opened, and in 1792 the charter was extended to seventy years. In 1828 the Warren Bridge Company was authorized to construct a bridge a short distance from the Charles River Bridge. The Warren bridge was to be free in six years or sooner if tolls paid its cost before then. The old bridge company was in effect destroyed, and sought an injunction from the state courts restraining its construction and use. The state supreme court failing to decide the case, a writ of error was taken to the Supreme Court. In the meantime the Warren bridge had become toll-free.

The main question in the case was this: Can a state grant a charter destroying the effect and value of a previous one? Does it not constitute an impairment of the obligation of a contract?

The decision, given by Taney, embraced the following points:

1. There was no evidence that the state had given an exclusive franchise, and such an interpretation required stretching the words of the charter so as to arrive at such a construction.

2. The English courts restrain within strict limits the spirit of monopoly. There is no reason why we, having adopted the jurisprudence of England, should construe a statute in favor of monopoly, and against the public and the rights of the community.

3. It would be inconvenient and inexpedient to construe old franchises and contracts as preventing new ones, even conflicting with, the old, which introduce improvements, and take advantage of modern science. Should the railways yield to the old turnpike corporations?

4. The limitations of state control of private corporations would threaten and render useless the continued existence of the government, when the powers necessary to accomplish its ends and the functions it was designed to perform were transferred to the hands of privileged corporations.

5. The charter must be strictly construed, and nothing can be claimed which is not clearly given. Ambiguity must be resolved in favor of the public, and against the corporation.

6. The rights of the community must be safely guarded, as are the rights of private property. In the course of the opinion, the Chief Justice made the following significant statement:

> But the object and end of all government is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created. . . . A state ought never to be presumed to surrender this power, because, like the taxing power, the whole community have an interest in preserving it undiminished. . . . While the rights of private property are safely guarded, we must not forget that the community also have rights, and that the happiness and well-being of every citizen depends upon their faithful preservation.

Taney, in this decision, began his construction of the Constitution freely for the state, and narrowly for the individual. While Marshall regarded the end of government and the purpose of the Constitution as protecting individual and private rights, Taney regarded the happiness and prosperity of the people and of the community as paramount. Moreover, Taney used the doctrine of political expediency in favor of the state governments as against individuals and corporations, much as Marshall used the same doctrine in favor of the federal government as against the state governments, and in protecting private rights.

Story gave a strong dissenting opinion. Kent, writing to Story, said: "The legislature is bound by everything that is necessarily implied in the contract." He (Story) feared that no law of a state legislature or law of Congress would be declared unconstitutional, "for the old constitutional doctrines are fast fading away, and a change has come over our public mind from which I augur little good." Thereupon Story considered resigning from the Supreme Court. In a letter to the Honorable Ezekiel Bacon, April 12, 1845, he declared:

> Although my personal position and intercourse with my Brethren on the Bench has always been pleasant, yet I have been long con-

vinced that the doctrines and opinions of the "old court" were daily losing ground, and especially those on great constitutional questions. New men and new opinions have succeeded. The doctrines of the Constitution, so vital to the country, which in former times received the support of the whole court, no longer maintain their ascendancy. I am the last member now living, of the old court, and I cannot consent to remain where I can no longer hope to see those doctrines recognized and enforced. For the future I must be a dead minority of the court, with the painful alternative of either expressing an open dissent from the opinions of the court, or, by my silence, seeming to acquiesce in them. The former course would lead the public, as well as my brethren, to believe that I was determined, so far as I might, to diminish the just influence of the court, and might subject me to the imputation of being, from motives of mortified ambition, or political hostility, earnest to excite popular prejudices against the court. The latter course would subject me to the opposite imputation, of having either abandoned my old principles, or of having, in sluggish indolence, ceased to care what doctrines prevailed. Either alternative is equally disagreeable to me, and utterly repugnant to my past habits of life, and to my present feelings. I am persuaded that by remaining on the bench I could accomplish no good, either for myself or for my country.[1]

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CHAPTER XXIV

NULLIFICATION IN NEW ENGLAND AND SOUTH CAROLINA; SECESSION IN THE SOUTH

I. The Hartford Convention.

A. Reasons for the Convention. The Federalist party and New England opposed the War of 1812. It was asserted that its shipping interests had suffered during the war, and that embargoes had crippled it further; that the war had been declared and supported by people outside of and against the interests of New England; that the admission of new states in the West and South would soon give these regions complete control of the government; and that the government of the United States gave no thought to the interests of New England.

Gouverneur Morris, a member of the Constitutional convention, advocated that a new convention be held to determine whether the states of the North should remain in the Union. The Connecticut general assembly described the status of that state to the central government as "free, sovereign, and independent." The Massachusetts senate passed a resolution declaring that the war was without justifiable cause, and withheld its approval from military and naval plans unconnected with the defense of its seacoast and soil.

B. The Convention and the delegates. The Convention met at Hartford in October, 1814, at the call of Massachusetts. The delegates from Massachusetts, Connecticut, and Rhode Island were authorized by the state authorities. The delegates from New Hampshire and Vermont represented certain counties of these states. The sessions were secret. The avowed purpose of the Convention was to consider the dangers to the eastern section growing out of the war, and to determine upon some plan to prevent the ruin of the commercial interests and resources of New England.

C. The resolutions of the Convention. These general principles were agreed to: Congressional acts violating the Constitution are void; in case of emergencies, the states must be their own judges, and execute their own decisions; and in case

of dangerous and deliberate infractions, the state must intervene, and on its own authority, protect its citizens. Its specific proposals embraced a request to allow the New England states to devise a scheme of defense for themselves, to be paid for from taxes paid by these states, and the following suggested amendments to the Constitution: that new states should not be admitted to the Union without the consent of two-thirds of both houses of Congress; that slaves should not be reckoned in the apportionment of taxes and representatives; that war should not be declared or commercial intercourse broken off with other nations without the consent of two-thirds of both houses of Congress; that no embargo should exist for more than sixty days; that foreign-born citizens should not hold office; and, that the President should be declared ineligible to reelection.

D. Effect of the Convention. The resolutions of the Convention called for another session. The war came to an end before anything came of their suggestions. To defend their course, the New Englanders fell back upon the doctrine of nullification, which they condemned when suggested by the South. The leaders, bordering on treason, were consigned to the political wilderness.

II. Nullification in South Carolina.

A. Reasons for the nullification movement. This was due largely to the growth of protection as a national policy. The tariff of 1816 was designed to protect the infant industries and to create a demand for American agricultural produce. The western farmers and northern manufacturers thrived under this system. The southern cotton growers, shipping their cotton to England, wanted to purchase in the cheapest market, England. The " Tariff of Abominations " was passed in 1828. Clearly, the South was less prosperous than in the days of a low tariff. South Carolina, almost exclusively an agricultural state, suffered much financial loss from it.

B. Measures of nullification. The South Carolina concept of the Union included these principles: the Union is merely a compact of equal states; the federal government is only an agent of the states to carry into effect what it is commissioned to do; instructions to the federal government are contained in the Constitution; a violation of instructions by the federal government renders its action null and void; and the states are to be the judges of when the Constitution has been violated.

In the *Fort Hill Letter* of August 28, 1832, it was declared that the state in its capacity as a sovereign state could lawfully nullify federal usurpations of power; that the federal government had no authority to close the Charleston port of entry; protested against the tariff bill of 1832; and, as a general principle, sought to prove and establish the Union as federative, rather than national, in character.

The Ordinance of Nullification was passed by a Convention which met November 24, 1832, at the call of the state legislature issued on October 16, 1832. The vote was 136 to 26. The tariff was described as a violation of the Constitution, and therefore null and void. The acts of 1828 and 1832 were held not to be binding on South Carolina. State officials were compelled to take an oath to uphold the ordinance of nullification. The ordinance was to go into effect February 1, 1833. It contained the following significant statement:

> The people of this state will thenceforth hold themselves absolved from all further obligations to maintain or preserve their political connection with the people of other states and will forthwith proceed to organize a separate government and do all other acts and things which sovereign and independent states may of right do.

The Replevin Act was passed by the state legislature. The owner of seized goods might recover twice their value from the arresting and holding officer. Moreover, the governor was authorized to call out the state militia to enforce the laws of the state.

C. The Nullification Proclamation and the course of Jackson. At a Jefferson dinner in 1830, Jackson proposed this toast: "Our federal union; it must be preserved." Upon hearing of the course of events in South Carolina, he declared: "If a single drop of blood shall be shed there in opposition to the laws of the United States, I will hang the first man I can lay my hands on engaged in such conduct, upon the first tree that I can reach." He prepared to use the army and navy to sustain the authority of the federal government. During the course of the Proclamation, he declared:

> The laws of the United States must be executed; I have no discretionary power in the subject. My duty is emphatically pronounced in the Constitution. Those that have told you that you might peaceably prevent their execution deceived you. Their object is disunion, and disunion, by armed force, is treason. Are you ready to incur its guilt? If you are, on your unhappy state will fall all the evils of the conflict you force upon the government of your country.

The order by Jackson of troops into Fort Moultrie in the harbor of Charleston, and the enactment of the "Force Bill," brought things to a head.

D. The Clay Tariff of 1833. Jackson, in his message to Congress, asked for the limitation of protection to articles made in America needed in war time. Clay suggested a bill gradually reducing the tariff rates until they were equivalent to the rates of the measure of 1816 by the year 1842. This bill was passed.

South Carolina, regarding the action of Congress as a vindication of her position, repealed the Nullification Ordinance, but passed a measure nullifying the Force Bill.

E. The Hayne-Webster Debate. In support of nullification, Senator Hayne of South Carolina, in January, 1830, in a notable speech in the Senate Chamber, urged the South Carolina concept of the Union, set forth the proposition that the Union was a compact of sovereign states from which the parties could lawfully withdraw, and that the federal government could not be the judge of its own powers. Daniel Webster, Senator from Massachusetts, defended the national character of the Union in a celebrated reply. He set forth the following propositions: the Constitution is not a league between several states, but is founded upon the adoption of the people; no state can dissolve federal relations, for this can be done only by revolution, and secession is revolution; the supreme law of the land is indicated by the Constitution, and in the character of the suit, the Supreme Court is the final arbiter; an attempt to nullify is a violation of the Constitution of the United States.

III. Secession in the South.

The spirit of *nullification,* which is the retention of membership in the federal union, but refusing to be bound by certain of its laws, continued until it developed into a spirit of *secession,* which means withdrawal from the Union as a sovereign in the just exercise of its rights through the repeal of the act of ratification. The annexation of Texas, together with the plan to create eight new states of this territory, incurred the opposition of the North. The legislature of Massachusetts passed a resolution declaring that Texas was a foreign nation, and that under the Constitution, Congress had no authority to admit a foreign state. If it took place, Massa-

chusetts would leave the Union. William Lloyd Garrison suggested that the northern states secede in case Texas was brought into the Union a slave state.

The main causes of secession were the activities of the abolitionists, the raid of John Brown, the question of disposing of the territories, and the divergent views of the North and South over the character of the Union and the institution of slavery. Certain economic, diplomatic, social and political reasons caused the North to desire union and the South to work for disunion. We are interested here only in the constitutional aspects and issues of the conflict. The course of the war and the extra-constitutional aspects are for the historian.

In the end, the Union was preserved, Calhoun's theory of state sovereignty had to yield to that of national sovereignty, slavery was abolished, and the principles written into the Constitution by Hamilton and interpreted by Marshall, but overthrown by Jefferson and Jackson, were reëstablished by Lincoln after success on the field of battle.

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CHAPTER XXV

SLAVERY UNDER THE CONSTITUTION; THE SLAVE CASES

I. The constitutional aspects of slavery.

A. The apportionment clause, providing that three-fifths of the slave population should be counted in the apportionment of representatives and direct taxes.

B. The migration or importation clause, allowing the importation by the states of such persons as they choose to admit prior to the year 1808.

C. Fugitive slave and labor clause: "No person, held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."

In 1793, Congress passed an act providing summary proceedings for the removal of escaped persons bound to service. In 1850, as a part of the Great Compromise, there was enacted a drastic fugitive slave law. By its terms, its enforcement was placed in the hands of federal officials, thus removing state control over the matter. The masters or their agents, upon application in due form, could remove in a summary fashion their runaway slaves, without affording them the right of trial by jury, the right to witnesses, or the right to offer any testimony in evidence. Persons hindering its enforcement were to be heavily penalized.

D. The territorial clause: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." "New states may be admitted by the Congress into this Union." Upon these clauses the greatest discussions hinged.

Article six of the Northwest Ordinance of 1787 excluded slavery and involuntary servitude from the Northwest Territory. Thus, early in our history, the power of Congress over the territories of the United States was recognized. In 1812,

Louisiana was admitted to the Union over the strong protest of the Federalists, but with limitations on the admitted state. Under the Missouri Compromise of 1820, after a deadlock in the Senate, Maine was admitted as a free state and Missouri as a slave state. The residue of the Louisiana territory north of the parallel 36 deg. 30 min. was to be forever free, while to the south, slavery was to prevail. Senator King, in his speeches, disclosed an exhaustive study of these two clauses of the Constitution, and of the right of Congress to exclude slavery. The result was a compromise. The "Wilmot Proviso," which failed of adoption, resolved that slavery should be prohibited forever from every part of any territory acquired from Mexico.

Under the Great Compromise of 1850, the territories of New Mexico and Utah were created, to be admitted as slave or free, according to their own constitutions. California was admitted as a free state under a constitution which excluded slavery. The slave trade was abolished in the District of Columbia. In addition to this, a fugitive slave law was passed.

Under the Kansas-Nebraska bill of 1854, these territories were admitted "with or without slavery as their constitutions may prescribe at the time of their admission," and the Missouri Compromise was repealed as conflicting with the policy of non-intervention followed by Congress in regard to slavery in the territories. Therefore, the question of the power of Congress to prohibit slavery in the territories was reopened.

II. Dred Scott v. Sanford (19 Howard, 393).

Facts. In 1834, one Dred Scott, a negro slave belonging to Dr. Emerson, was moved from Missouri, a slave state, to Illinois, a free state. In 1836, Dr. Emerson removed from Illinois to the Minnesota Territory, which, under the Northwest Ordinance, was free territory. Dred Scott went with him and was allowed to marry. In 1838, Dred was taken back to Missouri. In 1846, he brought suit against the widow of his former master in the Missouri Circuit Court, claiming that he had been taken to Illinois, and thence to the Louisiana territory, which was free territory under the Northwest Ordinance and under the Missouri Compromise. He asserted that he had become free, and that he continued to be impressed with this status after his return with his master

to the state of Missouri. In 1850, the state Circuit Court found him to be free. The Supreme Court of Missouri, on appeal, held in 1852 that under the laws of Missouri he resumed his character of slave upon his return, without regard to his status outside the state. Suit was instituted in Scott's behalf by certain lawyers in the United States Circuit Court. To give jurisdiction to the court on the ground of diverse citizenship, Mrs. Emerson arranged for a fictitious sale of Scott to Sanford, her brother. Mrs. Emerson had in the meantime married an abolitionist representative from Massachusetts. This court found against Scott on May 15, 1854, and the case was taken to the Supreme Court on writ of error. Before the case was tried, the Missouri Compromise Act was repealed.

There are two ways the Supreme Court could have proceeded. It could have taken jurisdiction and applied the law of Missouri, thus avoiding the Missouri Compromise; or it might have dismissed the case for want of jurisdiction, Dred Scott not being a citizen.

The case was opened for the first time in 1856. On April 8, 1856, Judge Curtis wrote an uncle in confidence that the Court would not decide so as to involve the Missouri Compromise, as a majority of the court regarded it as unnecessary. The case was reargued in December, and Judge Nelson was designated to write the opinion, avoiding the Missouri Compromise. Early in 1857, a strange turn of events resulted in the designation of Taney to write the decision, so as to settle the question of the power of Congress over slavery in the territories.

Opinion of the court, as delivered by Chief Justice Taney.

1. Did the federal circuit court of Missouri have jurisdiction over the case? Was Scott a free citizen?

a. The people of the United States, under the Constitution, are the sovereign people, and the makers of the Constitution did not intend that negroes should be one of these sovereign people, nor that a state could make a negro a citizen of the United States.

b. Negroes were not citizens at the time of the adoption of the Constitution, and under its terms they were regarded as inferiors, for more could be imported as slaves, and fugitive slaves were to be returned.

c. The laws of Congress show that negroes are not citizens. The naturalization statutes mention whites, while the militia laws refer to whites, and make distinctions between whites and blacks. The Department of State has refused to extend protection to negroes on the ground that they are not citizens of the United States under the Constitution.

2. Did Scott's residence in Minnesota free him? Did Congress have the authority to pass the Missouri Compromise?

a. The Constitution, in giving Congress the right to make all needful regulations for territories and property of the United States, referred only to the territory as it existed in 1789.

b. The Louisiana territory was held in trust by the government for the benefit of the entire Union.

c. Under the Fifth Amendment, Congress cannot deprive one of life, liberty, or property, without due process of law. A law taking from a white man that for which money has been paid, is a violation of this amendment.

d. The Missouri Compromise is unconstitutional because it deprives of property without due process of law. Moreover, Congress did not have the power to pass it, and Dred Scott is not a citizen of the United States.

Dissenting opinion of Judge Curtis.

1. Who were citizens at the time of the adoption of the Constitution? It was held that those who were citizens under the Articles were citizens, for the Constitution did not change citizenship. Then, certain persons descendant from slaves were citizens. In the year 1781, five states had negro citizens. Free-born citizens of the states are citizens of the United States, and as such have the right to sue and to be sued in the federal courts. The act of civil marriage of Scott, agreed to by his owner in free territory, was practically an act of emancipation.

2. Is the Missouri Compromise constitutional? Yes, for Congress has the power to make all needful regulations, including the regulation of slavery in the territories.

3. Is Dred Scott a citizen? Yes, for the reasons given.

Change in the plans of the Court. It appeared after Judge Nelson had been assigned to write the opinion, avoiding the Missouri Compromise, that the dissenting judges, McLean and Curtis, intended to write opinions sustaining the consti-

tutionality of the act. Judge Wayne, believing that the question of slavery in the territories should be set at rest by the Court holding that Congress was powerless to prohibit it, both from the standpoint of expediency, and from the constitutional standpoint, persuaded Taney, Campbell, Daniel and Catron that the assignment to write the opinion should be given to the Chief Justice, and that the constitutional question should be covered. Judge Grier was opposed to expressing an opinion on the constitutional question. Catron, in the following letter, asked the coöperation of President-elect Buchanan in winning Grier to his point of view:

The Dred Scott case has been before the Judges several times since last Saturday, and I think you may safely say in your Inaugural: "That the question involving the constitutionality of the Missouri Compromise line is presented to the appropriate tribunal to decide, to-wit: the Supreme Court of the United States. It is due to its high and independent character to suppose that it will decide and settle a controversy which has so long and seriously agitated the country, and which *must* ultimately be decided by the Supreme Court. And until the case now before it (on two arguments) presenting the direct question, is disposed of, I would deem it improper to express any opinion on the subject." A majority of my brethren will be forced up to this point by two dissentients. Will you drop Grier a line, saying how necessary it is, and how good the opportunity is, to settle the agitation by an affirmative decision of the Supreme Court, the one way or the other? He ought not to occupy as the outside issue — that admitting the constitutionality of the Missouri Compromise Law of 1820, still, as no domicile was acquired by the negro at Fort Snelling, and he returned to Missouri, he was not free. He has no doubt about the question on the main contest, but has been persuaded to take the smooth handle for the sake of repose.

Buchanan, having evidently written to Grier, received the following letter from him on February 23:

Your letter came to hand this morning. I have taken the liberty to show it, in confidence, to our mutual friends, Judge Wayne and the Chief Justice.

We fully appreciate and concur in your views as to the desirableness at this time of having an expression of the opinion of the court on this troublesome question. With their concurrence, I will give you in confidence the history of the case before us, with the probable result. Owing to the sickness and absence of a member of the Court, the case was not taken up in conference till lately. The first question that presented itself was the right of a negro to sue in the Courts of the United States. A majority of the Court were of the opinion that the question did not arise on the pleadings and that

we were compelled to give an opinion on the merits. After much discussion it was finally agreed that the merits of the case might be satisfactorily decided without giving an opinion on the question of the Missouri Compromise; and the case was committed to Judge Nelson to write the opinion of the Court affirming the judgment of the Court below, but leaving these difficult questions untouched. But it appeared that our brothers who dissented from the majority, especially Justice McLean, were determined to come out with a long and labored dissent, including their opinions and arguments on both the troublesome points, although not necessary to a decision of the case. In our opinion, both the points are *in* the case and may be legitimately considered. Those who hold a different opinion from Messrs. McLean and Curtis on the power of Congress and the validity of the Compromise Act feel compelled to express their opinions on the subject, Nelson and myself refusing to commit ourselves. A majority, including all the judges south of Mason and Dixon's line, agreeing in the result, but not in their reasons — as the question will be thus forced upon us, I am anxious that it should not appear that the line of latitude should mark the line of division in the Court. I feel, also, that the opinion of the majority will fail of much of its effect if founded on clashing and inconsistent arguments. On conversation with the Chief Justice, I have agreed to concur with him. Brother Wayne and myself will also use our endeavors to get Brothers Daniel and Campbell and Catron to do the same. So that if the question must be met, there will be an opinion of the Court upon it, if possible, without the contradictory views which would weaken its force. But I fear some rather extreme views may be thrown out by some of our southern brethren. There will, therefore, be six, if not seven (perhaps Nelson will remain neutral), who will decide the Compromise law of 1820 to be of *non-effect*. But the opinions will not be delivered before Friday, the 6th of March. We will not let any others of our brethren know anything about *the cause of our anxiety* to produce this result, and though contrary to our usual practice, we have thought it due you to state to you in candor and confidence the real state of the matter.

On the fourth of March, 1857, Buchanan, in his Inaugural Address, referred to the simple rule adopted by Congress in regard to slavery in the territories, namely, that the majority shall govern. As to the constitutionality of the Missouri Compromise, the question was before the Supreme Court, which would speedily and finally settle the question. "To their decision," he declared, "in common with all good citizens, I shall cheerfully submit, whatever this may be, though it has ever been my individual opinion that, under the Kansas-Nebraska Act, the appropriate period will be when the number of actual residents in the territory shall justify the

formation of a Constitution with a view to its admission as a state into the Union."

Charges of collusion between the President-elect and the majority of the Court to declare the Missouri Compromise unconstitutional, were made. The letters of Catron and Grier prove communication to the executive of what was generally regarded as confidential information, but the practice was common where confidence was enjoined. Indeed, the majority of the court, instead of wanting to decide the constitutional question, desired to remain non-committal on this point until the dissenting justices forced them to state their views.

Lincoln, in his campaign speeches, attacked the Dred Scott decision. In his inaugural address, he made the following comment on the Supreme Court:

> I do not forget the position, assumed by some, that constitutional questions are to be decided by a Supreme Court; nor do I deny that such decisions must be binding in any case, upon the parties to a suit, as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the government. And while it is obviously possible that such decisions may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time, the candid citizen must confess that if the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal. Nor is there, in this view, any assault upon the court or the judges. It is a duty from which they may not shrink to decide cases properly brought before them, and it is no fault of theirs if others seek to turn their decisions to political purposes.

III. Ableman v. Booth (21 Howard, 506).

Facts. Three negroes were playing "seven-up" near Racine, Wisconsin. One of them was seized by a United States marshal, taken to Milwaukee, and put in jail. Sherman H. Booth, editor of the *Wisconsin Free Democrat*, a Free Soil paper, printed a handbill calling upon the citizens and asking whether they would permit a man to be carried out of the state without judicial proceedings. He called a

meeting and decided to ask the county judge to issue a writ of habeas corpus, with a view to securing the negro's dismissal and sending him to Canada. On the advice of the federal judge, the sheriff refused to deliver up the prisoner. Thereupon the assembly of people went to the county jail, broke into it, took the negro and carried him into Canada. An extra-legal convention met on April 13, 1854, and passed resolutions resembling the Kentucky resolutions. The owner of the negro had Booth arrested for aiding and abetting the escape of a slave, and he was brought to trial before the United States District Court. Booth applied to the state supreme court for a writ of habeas corpus before the federal court met for trial. The state supreme court held the fugitive slave law to be unconstitutional and Booth was liberated. He was rearrested, convicted by the federal District Court, and sentenced to pay a fine of $1,000 and to one month's imprisonment. The fugitive slave law was held to be constitutional. Again, meetings were held and resolutions bordering on nullification were passed. Booth again had recourse to the supreme court of the state, which again released him on a writ of habeas corpus, and still held the law to be unconstitutional.

Ableman, the United States marshal, brought an action against Booth. Upon application to the Supreme Court, a writ of error was issued commanding the Wisconsin supreme court to make a return of its judgment and proceedings for review by the United States Supreme Court. The state supreme court paid no attention to the writ, but a decision was made.

Points in Taney's decision:

1. The prisoner was held under the authority of the United States.
2. All the actions of the state courts were invalid.
3. The fugitive slave law is constitutional.
4. The Supreme Court is the ultimate tribunal to decide disputes between the state and federal governments. In regard to the position of the Supreme Court, he said:

> So long, therefore, as this Constitution shall endure, this tribunal must exist with it, deciding in the peaceful forms of judicial proceedings the angry and irritating controversies between sovereignties, which in other countries have been determined by the arbitrament

of force. Further, nor can it be inconsistent with the dignity of a sovereign state, to observe faithfully, and in the spirit of sincerity and truth, the compact into which it voluntarily entered when it became a state of this Union. On the contrary, the highest honor of sovereignty is untarnished faith.

In this able opinion, Taney equaled Marshall in his logic and vigor, while upholding the supremacy of federal jurisdiction under the courts. He pointed out in vigorous fashion the dangers attending an asserted supremacy by state courts over federal courts, and declared that supremacy must be connected with "permanent judicial authority," or controversies between the jurisdictions must be settled by force of arms. This was Taney's ablest decision.

Resolutions of the Wisconsin legislature. The legislature resolved, in substance, the following:

1. The assumption of jurisdiction by the federal judiciary was an act of undelegated power, and therefore without authority, void, and of no force.

2. It was an "arbitrary act of power, unauthorized by the Constitution, and virtually superseding the benefit of the writ of habeas corpus and prostrating the rights and liberties of the people at the foot of unlimited power."

3. The principle contended for, that the general government is the exclusive judge of the extent of the powers delegated to it, stops nothing short of despotism.

4. The states which formed the Constitution, "being sovereign and independent, have the unquestionable right to judge of its infraction; and that a positive defiance of these sovereignties, of all unauthorized acts done or attempted to be done under color of that instrument, is the rightful remedy."

These resolutions were a restatement of the Virginia and Kentucky resolutions and of the New England and South Carolina doctrines of nullification. Booth's attorney, Byron Paine, was elected a member of the state supreme court, due to the wide attention attracted by this case.

Booth was arrested again in March, 1860, and he again sought a writ of habeas corpus in the State Supreme Court. He was rescued in August, and rearrested in October. Carl Schurz, retained as attorney, declared: "The Republican party went to the very verge of nullification, while the Democratic party . . . became an ardent defender of the Federal power."

Booth was eventually pardoned by President Buchanan.

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CHAPTER XXVI

THE CIVIL WAR CASES: THE PROTECTION OF PRIVATE RIGHTS AND THE MILITARY POWERS OF THE GOVERNMENT

I. Ex parte Merryman (Fed. Cas. No. 9, 487).

John Merryman, of Baltimore, was arrested on May 25, 1861, accused of hostile actions against the government of the United States. General Cadwalader placed him in Fort McHenry, under military control. Merryman appealed to Chief Justice Taney for a writ of habeas corpus. The writ was granted on May 27th. General Cadwalader refused to respond, on the ground that he was authorized by the President to suspend the writ of habeas corpus for the public safety. On the same day, a writ of attachment was issued by the Chief Justice in order to bring the General into court to answer for not producing the body of Merryman. May 28, the United States Marshal was prevented from entering the fort, and the writ was ignored.

Under the Constitution, it is provided that, " The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it." In pursuance of this provision, and to make it easier to take federal troops through Maryland, the writ was suspended on executive authority between Baltimore and Washington.

In a written opinion, Chief Justice Taney urged the following points:

1. The President not only claims the right to suspend the writ, but to delegate this power to a military officer, who, under its protection, chooses not to obey judicial process.

2. The right to suspend the writ follows an enumeration of legislative — not executive — powers, and it is generally understood that Congress only can lawfully exercise the right.

3. No notice had been given that the President had assumed the power, or that it had been thus exercised.

4. If such a condition of affairs shall continue, " the people

of the United States are no longer living under a government of laws, but every citizen holds life, liberty and property at the will and pleasure of the army officers in whose military district he may happen to be found." In justification of his position, Taney stated:

> I have exercised all the power which the Constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome. It is possible that the officer who has incurred this grave responsibility may have misunderstood his instructions, and exceeded the authority intended to be given him. I shall, therefore, order all the proceedings in this case, with my opinion, to be filed and recorded in the Circuit Court of the United States for the district of Maryland, and direct the clerk to transmit a copy, under seal, to the President of the United States. It will then remain for that high officer, in fulfillment of his constitutional obligation, to " take care that the laws be faithfully executed," to determine what measures he will take to cause the civil process of the United States to be respected and enforced.

Opinion of the Attorney-General. The Attorney-General, at the request of the President, submitted an opinion on the question embracing the following points:

1. When an insurrection threatens the existence of the nation, the President has the discretionary authority to arrest and detain " persons known to have criminal intercourse with the insurgents, or persons against whom there is probable cause for suspicion of such criminal complicity."

2. The President has the power to suspend the privilege of the writ of habeas corpus as regards persons so apprehended, since he is charged under the Constitution to preserve the public safety, and is the sole judge of when an emergency exists requiring the suspension.

3. The President is answerable only to the high court of impeachment, and to no other tribunal, for his official conduct.

The President continued to suspend the writ, and denied the right of the judiciary to intervene. Indeed, in a proclamation issued February, 1862, he declared that the judicial machinery seemed designed " not to sustain the government, but to embarrass and betray it."

II. The Prize Cases (2 Black, 635).

The Brig Amy Warwick; the Schooner Crenshaw; the Schooner Brilliante; the Bark Hiawatha (1863).

Certain goods and vessels were captured by Union gun-

boats charged with violating the blockade of Southern ports established by President Lincoln. Due to a general lessening of judicial authority on account of civil war, some of the justices were opposed to the President's method of conducting the war. The question was whether the President had the right to institute a blockade of ports controlled by persons in armed rebellion against the government. It was felt in certain quarters that the decision would be adverse to this exercise of power by the executive.

Decision of the court. Has the government the power to establish a blockade of its own ports during a civil war? May the President order such a blockade without an act of Congress declaring the existence of a state of war?

1. Under the Constitution, Congress alone has the right to declare a foreign or international war, but a civil war is a sudden and unexpected event.

2. Civil war is a fact which the President must recognize.

3. The President must take care that the laws are faithfully executed.

4. The executive is compelled to deal with the situation without waiting for the Congress to act.

5. It is the President's duty to decide whether or not a blockade is a proper measure to oppose a rebellion. If he so decides, he has the clear right to institute it.

6. The President may by proclamation declare a state of war to exist where in his opinion the domestic strife has attained the proportions of a public conflict.

Concerning the status of the rebellion, the court declared:

> After such an official recognition by the sovereign, a citizen of a foreign state is estopped to deny the existence of a war with all its consequences as regards neutrals. They cannot ask a court to effect a technical ignorance of the existence of a war, which all the world acknowledges to be the greatest civil war ever known in the history of the human race, and thus cripple the arm of the government and paralyze its power by subtle definitions and ingenious sophisms. The law of nations is also called the law of nature; it is founded upon the common consent, as well as the common sense, of the world. It contains no such anomalous doctrines as that which this court is now for the first time desired to pronounce, to wit: that the insurgents who have arisen in rebellion against their sovereign, expelled her courts, established a revolutionary government, organized armies, and commenced hostilities are not enemies, because they are traitors; and a war levied on the government by traitors, in order to dismember and destroy it, is not a war, but an insurrection.

Dissenting opinion by Judge Nelson. This opinion, concurred in by Chief Justice Taney, and Justices Catron and Clifford, covered the following points:

1. The power to bring about a state of war is lodged in the Congress.

2. A war must be recognized or declared by the war-making power of the government, in order to exist legally.

3. The legal status of a government or the relations of its citizens from a state of peace to that of war cannot be changed by any lesser power.

4. The activities of the government preceding the formal declaration was a personal war, the actual state of war beginning only after the Act of Congress of July 13, 1861, went into effect.

5. Under the Constitution, therefore, the President does not have the right to declare war, nor can he lawfully institute a blockade.

The proposition that the President may, at his discretion, by proclamation declare a state of war to exist, maintained by the majority, is questionable. This has never been understood to extend to an international war. From the standpoint of public policy, it seems best to leave to the President the form and extent of resistance to a rebellion, and to regard the acts of the political departments as final, and binding on the courts.

The government, while claiming the right to institute the blockade, denied that it conferred upon the insurrectionists the status of belligerents, and entitled them to the rights of war. The recognition of the belligerency of the Confederate States by foreign maritime nations, through proclamations of neutrality, was protested by the federal government.

III. Ex parte Milligan (4 Wallace 2).

The legality of the military commissions constituted by President Lincoln, was first considered in the case of Charles L. Vallandigham, candidate for the democratic nomination for governor at the time General Burnside assumed command of the department of Ohio. The General issued an order commanding death as the penalty for all who declared sympathy for the enemy. Vallandigham was arrested for some radical statements made at a democratic mass meeting, and imprisoned. After trial, he was detained until the end of the

war. Application was made to the Supreme Court for a writ of habeas corpus. The court held that it could not issue the writ, for under the Judiciary Act, its appellate jurisdiction extended only to appellate courts. In other words, the court had no power to review the proceedings of a military commission ordered by a military officer. Much criticism was leveled at the President for upholding the acts of these commissions. He replied that, notwithstanding his regard for individual rights, courts of justice could not deal with such cases adequately, and he must do what seemed required for the public safety.

One Milligan was arrested at the order of the commanding General of the military district of Indiana. He was tried by a military commission in October, 1864, charged with giving aid and comfort to the insurrectionists, conspiracy against the government, disloyal conduct, and violating the laws of war. He was adjudged guilty and sentenced to be hanged on May 19, 1865. On May 10, he applied to the United States Circuit Court for the district of Indiana. The judges disagreed, and the question of law was certified to the Supreme Court. The government was represented by Attorney-General James Speed, Henry Stanbery and Benjamin F. Butler. The prisoner was ably represented by David Dudley Field, General James A. Garfield, and Jeremiah S. Black.

The defense claimed that under the Act of March 3, 1863, he could be brought before a military commission, which must either turn him over to the proper civil tribunal to be prosecuted according to the laws of the land, or release him. He sought release.

Decision of the court.

1. In states not invaded, and not engaged in rebellion, and where the civil courts are open, military commissions cannot be instituted to try, convict, or sentence anyone for a crime who was not a resident of a state in rebellion.

2. The power to institute such tribunals is limited to the actual theater of the war, where the civil courts are not open.

3. Congress cannot invest military courts under such conditions with such powers.

4. The Constitution guarantees to the individual the right of trial by jury, which can be denied only in the land and naval forces, and in the militia, in times of war or danger to the public.

5. The actual test is whether war is being carried on, and whether the courts are closed.

Judge Davis, who delivered the opinion, declared: "The Constitution of the United States is a law for rulers and people, equally, in war and peace, and covers with the shield of its protection, all classes of men, at all times, and under all circumstances." The provisions, therefore, cannot "be suspended during any of the great exigencies of government."

The dissenting opinion. Chief Justice Chase delivered a dissenting opinion, concurred in by Judges Miller, Swayne, and Wayne, agreeing with the majority as regards the limitation of the power of the President in the case before the Court, but holding that such limitation did not extend to the Congress. The opinion stated:

1. That under the circumstances of this case, Congress had the power to institute military tribunals.

2. That the courts might be open and discharging their functions, and yet wholly incompetent to punish guilty conspirators with adequate promptitude and certainty.

3. "The power of Congress to authorize trials for crimes against the security and safety of the national forces may be derived from its constitutional authority to raise and support armies and to declare war, if not from its constitutional authority to provide for governing the national forces."

The majority opinion, giving practical effect to the right of the citizen to protection against arbitrary military action, has found a permanent place among those distinguished papers which, taken together, constitute the Charter of American liberties. Never in its history, however, was the court so bitterly assailed. The Reconstructionists and Radical Republicans declared that the doctrine of the court, if acted upon in war time, would have led to defeat. Moreover, they regarded the decision as upholding President Johnson's efforts to checkmate the Congressional plans for reconstruction. In the opinion of many people in both parties, the court justified its high position by affirming the principle of law and order as against lawlessness and usurpation. The Democratic press praised the Supreme Court as an institution uncontaminated by the spirit of arbitrary proceedings, which threatened the existence of civil liberty. The press of the former Confederate states approved heartily of the decision, and referred to the position of the Supreme Court and the judiciary as the one

department of the government which could rise above the passions of the hour, and effectively check the usurpations of power of other departments — a proposition strongly assailed by this press during the régime of John Marshall.

President Johnson, looking upon the decision as an approval of his plan to bring to an end military government in the South, dismissed trials of civilians pending in the states in which the Republicans still claimed a state of war existed. Some Republicans regarded the decision of the court and the policy of Johnson as leading to the conclusion that the trial and conviction of Lincoln's murderers was illegal, and their execution as the result of lynch law.

Proposals were made designed to check the power of the court. John A. Bingham, Representative from Ohio, urged that the court's appellate jurisdiction be taken away altogether and at once. Thomas Williams, of Pennsylvania, suggested that the concurrence of all the judges should be required to reach a decision on a constitutional question. George S. Boutwell, of Massachusetts, in an attempt to neutralize the decision of the court, introduced a bill providing that no person who had engaged in the rebellion or supported its cause should act as attorney in the courts of the United States. While these measures failed to pass, they manifested in a striking way the tendency of the political departments to reduce the power and prestige of the Court when these departments failed to get their courses of action approved and sustained by the highest tribunal in the country.

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CHAPTER XXVII

THE LEGAL TENDER CASES

I. Hepburn v. Griswold (8 Wallace, 603).

Facts. On June 20, 1860, one Mrs. Hepburn made a promissory note payable to Henry Griswold on February 20, 1862, for $11,250. Mrs. Hepburn failed to pay the note when due. Griswold sued to recover from Mrs. Hepburn. In 1864, she tendered $12,720 in United States notes (greenbacks) as payment. Griswold refused to receive these notes, but they were tendered and paid by the court. The Kentucky Court of Appeals reversed the decision of the lower court. Mrs. Hepburn then appealed to the Supreme Court of the United States.

Decision of the court. The court's decision was delivered by Chief Justice Chase. The doctrine of implied powers was generally admitted by the court. The decision embraced the following points:

1. While the legislature has unrestricted choice among all necessary and appropriate means to carry its powers into execution, it was the function of the court to determine whether the means chosen came within that category.

2. Contracts for the payment of money made prior to the Act of 1862 referred to coined money, and could not be discharged, except as agreed otherwise, in anything but coin.

3. A law not made in pursuance of an express power, which necessarily, by its operation, impairs the obligation of contracts, conflicts with the spirit of the Constitution.

4. The Act of Congress which made greenbacks legal tender did not carry into effect any express power vested in Congress.

5. The Legal Tender Act, as applied to contracts prior to its enactment, was unconstitutional, for Congress had no power to declare the notes legal tender for such debts.

The dissenting opinion. Judges Miller, Swayne and Davis dissented. They accepted the general principle of implied powers agreed upon by the majority. They held:

1. That "this law was a necessity, in the most stringent sense in which that word can be used."

2. That the war brought into operation potent and expensive powers of belligerency.

3. Congress had the right to determine whether the issue of legal currency was necessary in order to carry on the war.

The decision in this case was awaited with interest and expectancy by the leading commercial classes, and by those who upheld or opposed the theory of dominant war powers of the government. Municipal corporations, public utility corporations, and debtors generally desired to discharge obligations contracted on a gold basis prior to the war, with depreciated currency amounting to legal tender. The banks and creditors wanted payment in gold, and opposed the government's asserted right to make paper currency legal tender.

The Court was for some time unable to come to a decision. The Act of 1866, passed to prevent President Johnson from filling vacancies, had reduced the Supreme Court to eight members, thus making a deadlock possible. When Grant became President, the Court was increased to nine. Attorney-General Hoar was nominated by the President, but the Senate did not confirm him. Judge Grier resigned on December 15, 1869, to take effect February 1, 1870. Edwin M. Stanton was nominated in Grier's place and was immediately confirmed by the Senate, but he died four days after his nomination. The decision of the Court was announced on February 7, a few days after the resignation of Grier became effective. The Court, therefore, consisted of seven members, the Chief Justice and three of the judges upholding the opinion of the Court, and three dissenting. On the same day, Grant sent to the Senate the names of Joseph P. Bradley of New Jersey and William Strong of Pennsylvania to fill the vacancies made by the resignation of Grier and the death of Stanton. It was charged that Grant had advance information as to the decision of the Court, and that he "packed the Court" to secure a reversal. George S. Boutwell stated in his "Reminiscences of Sixty Years," that Chase had informed him of the conclusion of the Court two weeks before the decision was made. However, the President and members of the Cabinet expressly denied the charge of advance knowledge. Time and circumstances have substantially confirmed this view.

An agitation took definite shape seeking a review of the question in connection with pending cases. The decision in *Hepburn* v. *Griswold* referred only to contracts entered into

prior to the act, but the reasoning of the Court would make the law unconstitutional as regards contracts entered into after its enactment. The press was insistent upon a rehearing. The *New York Times* published editorials on the decision on February 8 and 9, 1870. On February 12, the editor began to attack the Court. On March 18, the *Times* demanded the appointment of judges for the two vacant seats who would, the paper hoped, reverse the decision. On March 25, the *Times* attacked the Chief Justice. Strong was confirmed by the Senate on February 18, and Bradley on March 21. Four days after Bradley's confirmation and one day after taking his seat (March 25), the Attorney-General moved for reconsideration.

II. Knox v. Lee (12 Wallace, 457).

On April 30, 1870, the Supreme Court ordered the reargument of this case. It concerned a confiscation law of one of the Southern states. The main question was the constitutional one: Are the legal tender acts valid as to all contracts, whether made before or after the act?

The decision of the court. In this decision, the new judges, Strong and Bradley, joined with the minority in *Hepburn* v. *Griswold*, Swayne, Miller and Davis, and now formed the majority. The majority opinion covered five points:

1. The magnitude of the issue must be considered. Serious consequences might result from a different course.

2. The Constitution must be followed as the guide of the Court. The instrument itself contemplates a liberal interpretation of its own provisions.

3. Any act is constitutional unless it is an inappropriate means of carrying out powers conferred upon the Congress.

4. Are the acts forbidden by the spirit or letter of the Constitution?

a. Congress has power to coin money, and is not forbidden to issue paper money.

b. Prohibitions against the states are expressed, but none are even implied for Congress.

c. Do the legal tender acts violate the contract clause of the Constitution? It was held that they do not, for the debtors were still obligated to pay in money. Moreover, the federal government was not forbidden to impair contracts.

d. Are the acts in conflict with the "due process" clause of the fifth amendment? It was held that there was no viola-

tion. "It has never been supposed," said the court, "to have any bearing upon, or to inhibit laws that directly work harm and loss to individuals." Tariff and embargo laws were cited as examples.

e. The decision in the case of *Hepburn* v. *Griswold* was made by a divided court. Precedents were cited for overruling decisions.

5. The legal tender acts, therefore, are a lawful exercise by Congress of the war power, as regards all contracts, whether entered into before or after the enactment of the statutes.

Chief Justice Chase, and Judges Nelson, Clifford and Field dissented, holding to the majority position in the *Hepburn* case.

III. Juilliard v. Greenman (110 U. S., 421).

In 1878, Congress passed a law providing for the reissue of notes. The principal question in the case was whether or not a legal tender act, valid in time of war, was valid in time of peace. Judge Gray delivered the opinion of the court (Judge Field dissenting):

1. By grouping together all powers bearing directly on the subject, as laying and collecting taxes, paying the debt of the United States, and borrowing and coining money; and by adding powers incidental to the exercise of the great expressed powers, as chartering banks, emitting bills of credit, and providing a national currency, the court decided that making treasury notes legal tender was, within the meaning of the Constitution, "necessary and proper" for carrying into execution the powers vested by the Constitution in the government.

2. Paper money issued under the legal tender act is simply money raised for public use on a pledge of the public credit.

3. The power to borrow money includes the power to issue, in return for money borrowed, the obligations of the United States in any appropriate form. This embraces notes.

4. The power to issue notes is an attribute of sovereignty.

5. The power to issue notes being included in the power to borrow money and to establish a national currency, cannot be destroyed by the principle of the impairment of contracts.

6. Legal tender acts are valid in peace as well as war.

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CHAPTER XXVIII

THE FOURTEENTH AMENDMENT; ITS FRAMING, ADOPTION, AND INTERPRETATION

I. The Framing and Adoption.

The Fourteenth Amendment includes important provisions relating to: (1) citizenship, (2) privileges and immunities of citizens and due process of law, (3) apportionment of representatives in Congress among the states according to their respective numbers, (4) exclusion from office of persons who, having previously sworn to support the Constitution, had supported the rebellion, (5) the validation of debts incurred by the government during the Civil War, and the nullification of debts incurred in aid of the rebellion, and (6) power given Congress to enforce the provisions of the amendment by appropriate legislation.

The clause of greatest interest, generally called the "due process" clause, is that part of the first section which reads as follows: "Nor shall any state deprive any person of life, liberty or property, without due process of law." This part of the amendment was drafted by John A. Bingham of Ohio. Bingham had in mind the teachings of John Marshall. The protection of freedmen, ostensibly the purpose of the amendment, was merely the occasion of it. The effect of the amendment was to extend the power of the national government, and to subject many of the acts of states and municipalities to review by the federal courts. The radical leaders in Congress, while desiring to punish the South through the second, third, and fourth sections, and to elevate the position of the negro through the fifth section (in addition to the Thirteenth and Fifteenth Amendments), also had in mind giving to the federal government, through section one, important powers heretofore enjoyed by the states. "They desired to nationalize all civil rights; to make the federal power supreme; and, to bring the private life of every citizen directly under the eye of Congress." Senator Roscoe Conkling declared the intent of the drafting committee was not only to raise the negro from bond-

age, but to include business interests and corporations seeking freedom from the interference of legislatures. The original proposal for the amendment was to this effect:

> Congress shall have the power to make all laws which shall be necessary and proper to secure to the citizens of each state all privileges and immunities in the several states, and to all persons in the several states equal protection in the rights of life, liberty and property.

This provision was forced to yield to the present one, on the ground that Congress would be authorized to invade the proper legislative sphere of the states. It is important only in showing the intent of the framers, which was finally realized in spite of the sacrifice in wording.

II. The Slaughter House Cases (16 Wallace, 36).

Facts. By act of March 8, 1869, the so-called "carpet-bag" legislature of Louisiana, through the influence of corruption and bribery, chartered the Crescent City Live-stock Landing and Slaughter-House Company, and granted a monopoly of the slaughter-house business within certain parishes of the City of New Orleans to this corporation. Other butchers in this district had to use its plants and pay a fee for their use. Certain butchers, following this outrage organized the Butchers' Benevolent Association, which sought to invalidate the charter. They claimed: 1. The charter creates an involuntary servitude forbidden by the Thirteenth Amendment. 2. It abridges rights and immunities of citizens under the Fourteenth Amendment. 3. It denies equal protection of the laws. 4. It deprives the independent butchers of their property without due process of law. The validity of the law was upheld by the state court. The case was taken to the Supreme Court on a writ of error.

Decision of the court.

1. The Louisiana statute, in the light of the history, purpose, and "pervading spirit" of the Fourteenth Amendment, does not violate it in any particular.

2. Under the amendment, the citizen is protected only in rights and immunities which flow from citizenship in the United States. The citizen must look to the state for protection of privileges and immunities flowing from state citizenship.

3. The amendment, in defining a citizen of the United States, did not increase privileges and immunities enjoyed by a citizen before its adoption; and only such rights existing in the government, its national character, its Constitution, or its laws, were protected by the national government.

4. It was not intended to bring within the power of Congress or the jurisdiction of the Supreme Court "the entire domain of civil rights heretofore belonging exclusively to the states." To do so "would constitute this court a perpetual censor upon all legislation of the states on the civil rights of their own citizens."

5. The privilege to slaughter animals and the right to immunity from monopoly of any business is a privilege or immunity flowing from state, and not national, citizenship.

6. To come within the purview of this provision, the action of a state must be directed by way of discrimination against the negroes as a class, or on account of their race.

The dissenting opinion. Judges Field, Swayne, Bradley, and Chief Justice Chase, dissenting, were of the opinion that the amendment should receive some construction which would make it effective, and this the majority opinion did not do. Such privileges and immunities as pertained only to citizens of the United States were adequately protected before the adoption of the Fourteenth Amendment. The monopoly was condemned as an indefensible violation of the rights of many for the benefit of a few. Moreover, such grants of exclusive privileges required no aid from a bill of rights to nullify them, and the plaintiffs were entitled to protection under the amendment. Said Judge Swayne:

> By the Constitution, as it stood before the war, ample protection was given against oppression by the Union, but little was given against wrong and oppression by the states. That want was intended to be supplied by this Amendment. Against the former, this court has been called upon more than once to interpose. Authority of the same amplitude was intended to be conferred as to the latter. But this aim of our jurisdiction is, in these cases, stricken down by the judgment just given.

III. Munn v. Illinois (94 U. S., 113), and the Granger Cases.

Chief Justice Chase died May 7, 1873. His work was mainly that of constitutional interpretations growing out of the problems of the war and reconstruction. It was a con-

troversial period; and the validity of the court's claim to its position as final arbiter on constitutional questions, to maintain the balance provided by the framers, was put severely to the test. The record of the court, in spite of bitter criticism, was an honorable one.

Chief Justice Waite began his work on March 4, 1874, and served from Grant's second term through Cleveland's second administration. With the war and reconstruction problems out of the way, Waite dealt in the main with new social and economic issues, as the Granger laws, the regulation of interstate commerce, the question of public utilities and rates, strikes and industrial conflicts, and many other cognate subjects.

The industrial situation forms the background of *Munn* v. *Illinois*. There was at the time a great financial and industrial crisis. Prior to this, great areas of land had been granted to the railroads. Much state legislation was directed against railroads and warehouses. In Illinois, a law was passed in 1871, in compliance with the new Illinois constitution of 1870, which required the state legislature to enact laws " for the protection of producers, shippers and receivers of grain and produce." By this statute, warehouses were made quasi-public service corporations. Warehouses of a certain class were required to take out a license and to maintain fixed maximum rates on storage of grain. The law was attacked as depriving of life, liberty and property without due process of law, under the fourteenth amendment. One of the lawyers for the plaintiff, quoting the Illinois Supreme Court, declared that a government without the power to regulate is but the shadow of a government, and a mockery.

Decision of the court. Chief Justice Waite read the decision. The main questions were whether or not the Illinois legislature had the power to fix rates, and the meaning of the word " deprive " as used in the fourteenth amendment. The court decided:

1. " Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created."

2. The grain elevator business has been established for twenty years, has increased in magnitude until it has become a virtual monopoly, and affects the grain business in several states profoundly.

3. The whole public has a direct and positive interest in the business, and the Illinois statute merely extends the principle of public control to "this new development of commercial progress."

4. The possibility of abuse of this power is no argument against its existence.

5. "For protection against abuses by legislatures, the people must resort to the polls, not to the courts."

The dissenting opinion. Judge Field, the only dissenting judge, held:

1. According to the majority opinion, property loses something of its private character when employel in such a way as to be generally useful.

2. The doctrine that property, used in such a way as to affect the community at large, is for this reason clothed with a public interest, destroys the efficacy of the constitutional guaranty.

3. The public has an interest in many private business enterprises, and to give the public the right to regulate the prices and rates of such businesses will destroy the rights of private property.

On the same day, the Illinois statute relating to the grain elevator rate, was upheld; laws establishing maximum passenger and freight rates on all railroads operating in Illinois, Minnesota, Iowa and Wisconsin were sustained by the Supreme Court. These cases, taken together, are popularly known as the *Granger Cases.* They involved the Fourteenth Amendment, the obligation of contract clause, and the commerce clause of the Constitution. The court was of the opinion that under the Constitution the police power of the state extended to the regulation of public corporations, and that this included the fixing of rates. In the opinion of Judge Field, who dissented, the court had not protected the stockholder from practical confiscation and the people from arbitrary and extortionate charges, but had merely applied the principle of *Munn* v. *Illinois,* and the wide scope of the decision would practically destroy "all the guaranties of the Constitution and of the common law." In the case of *Peik* v.

Chicago and Northwestern R. R. (94 U. S. 164), a Wisconsin statute fixing rates for freight and passengers was upheld. The court declared that if the rates were just, an appeal for relief must be made to the legislature.

IV. Chicago, Milwaukee & St. Paul R. R. v. Minnesota (134 U. S., 418).

In 1887, the Minnesota legislature created a commission with authority to put into effect its own rates in case unequal or unreasonable rates were denied by railroads. This act differs from the previous ones in that a commission is established with rate-fixing powers. The commission reduced the rate on milk over a portion of the defendant's line, and sought a writ of mandamus to enforce compliance with its regulation. The defendant contended that its existing rate was reasonable, and that the new one was a deprivation of property without due process of law. It was urged in favor of the railroad that the courts must act as arbiter between conflicting interests — in this case the railroad and the people. The State Supreme Court refused to permit the defendant to take testimony as to the unreasonableness of the new rate, and granted the writ of mandamus. The case was carried to the Supreme Court on writ of error.

Decision of the court:

1. The question of the reasonableness of a rate of charge for transportation by a railroad company, involving, as it does, the element of reasonableness, both as regards the company and as regards the public, is eminently a question for judicial investigation requiring due process of law for its determination.

2. Where rates have been determined by legislative authority, depriving the railroad of its clear right to a judicial investigation of the reasonableness of the rates established, the act is void.

3. This case amounts to deprivation of the lawful use of property without due process of law, and a denial of the equal protection of the laws.

The dissenting opinion. Judges Bradley, Gray and Lamar dissented, laying down these propositions:

1. The regulation of such matters is a legislative act.

2. The legislature, and not the courts, is the final arbiter between such conflicting interests.

3. The problem of fixing railroad rates is an administrative, and not a judicial, duty.

4. There is no valid objection to the Minnesota law on the ground of its finality.

5. Deprivation of property by arbitrary process on the part of the legislature, or fraud on the part of the commission, are the only grounds on which judicial relief may be sought.

6. "There was merely a regulation of the enjoyment of property, made by a strictly competent authority, in a matter entirely within its jurisdiction."

V. Smyth v. Ames (169 U. S., 145).

An act of the Nebraska legislature, passed in 1893, classified freights, fixed freight rates, and provided for a railroad commission with power to reduce rates in order to make them reasonable and just. The act also provided that the railroad could appeal to the courts against the regulation of the commission. An injunction was sought. Webster and W. J. Bryan appeared for the state, while J. C. Carter represented the railroads. The railway interests attempted to show that the railroads would have made their cost of operations had the rate of 1893 been in effect during the two preceding years. The railroads urged the following propositions:

1. Prices of carriage are everywhere fixed by the law of competition.

2. Railroads will charge all the traffic will bear, but the public is protected against extortionate rates.

3. It is not admissible to inquire of the cost of a particular service in order to fix rates.

4. Charging all the traffic will bear merely indicates to railroad managers the necessity of charging low rates.

Decision of the court. The court declared:

1. That a corporation is a person within the meaning of the "due process" clause of the fourteenth amendment.

2. That rates which will not allow such compensation as is just to the railroad and the public under all circumstances, amount to a deprivation of property without due process of law.

3. That rates are primarily for legislative determination, but are subject to judicial inquiry.

4. The proposition that a legislature, state or federal, can determine what is constitutional, is contrary to the entire theory of the American Constitution.

5. That reasonableness within the state must be determined apart from interstate commerce.

6. If the capital of the railroad is fictitious, it may not impose rates to earn dividends on an excessive capitalization. Stocks and bonds are not to be considered alone.

7. The public is fully protected if the business which is regulated is confined to the receipt of reasonable rates.

8. Reasonable rates are to be measured by operating expenses, plus a fair return upon the fair value of the property being used by the business for the convenience of the public.

9. In order to ascertain that value, the following factors are to be given such weight as may be just and right in each case.

a. The original cost of construction.

b. Cost of permanent improvements.

c. Amount and market value of bonds and stock.

d. Present as compared with the original cost of construction.

e. Probable earning capacity under the rates fixed by law.

f. Operating expenses.

Thus, the Nebraska law was held invalid, and the original position of the court in *Munn* v. *Illinois*, was abandoned.

VI. Lochner v. New York (198 U. S. 45).

A law of the New York legislature prohibited anyone employed in a baking or confectionery establishment to work over 60 hours a week, or an average of 10 hours a day for the number of days employees worked. Lochner was arrested in Utica, N. Y., for violating this statute, and convicted in the county court. The conviction was affirmed by the Court of Appeals of New York. It was remanded to the original court for further proceedings, and was carried on writ of error to the Supreme Court of the United States.

Decision of the court.

1. The right to make a contract is a part of the liberty of the individual, protected by the fourteenth amendment.

2. The right to purchase or sell labor is part of the liberty protected by the amendment, unless circumstances exist which exclude the right.

3. The statute does not come under the legitimate police

power of the state as a proper regulation of the safety, health, morals, and general welfare of the people.

4. The statute interferes with the right of liberty of contract, and is therefore void.

The dissenting opinion of Judge Holmes.

1. The liberty of the citizen to do as he likes, so long as he does not interfere with the liberty of others to do the same, is interfered with by many laws.

2. "The fourteenth amendment does not enact Mr. Herbert Spencer's Social Statics."

3. Federal and state statutes cutting down the liberty to contract, have been sustained by the Supreme Court.

4. "But a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, or even shocking, ought not to conclude our judgment upon the questions whether statutes embodying them conflict with the Constitution of the United States."

5. "General principles do not decide concrete cases. The decision will depend upon a judgment or intuition more subtle than any particular major premise."

6. "I think that the word 'liberty,' in the fourteenth amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."

VII. Civil Rights Cases (109 U. S. 3).

The Civil Rights Bill of 1875 guaranteed to all citizens of the United States full and equal enjoyment of the privileges of inns, conveyances, theaters, etc., and stipulated that such enjoyment should not be subject to any conditions applicable only to citizens of a particular race or color, or who had been in a previous condition of servitude. Suit was brought against certain proprietors for violations of this act.

Decision of the court.

1. The denial of these privileges is not an indication of slavery or involuntary servitude.

2. The fourteenth amendment is a prohibition against states, not individuals.

3. No law has been made by the state abridging rights or denying equal privileges to citizens of the United States.

4. The acts complained of were committed by individuals, hence the case did not come within the meaning of the fourteenth amendment.

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CHAPTER XXIX

CITIZENSHIP

I. Definition and sources of citizenship.

The terms citizenship and nationality are often used synonymously and interchangeably. National character, however, of a certain kind, may be traced to sources other than citizenship. Service as a seaman invests one with a certain national character, and the right to national protection. The greatest source of national character is citizenship, which, according to John Bassett Moore, "is a term of municipal law, and denotes the possession within the particular state of full civil and political rights, subject to special disqualifications, such as minority or sex. The conditions on which citizenship is acquired are regulated by municipal law." Just as there is in the United States a concept of dual sovereignty (that of the states and of the nation), so also is there a dual citizenship, designating the relation of the citizen to the several states, and to the United States. Citizenship in a state does not impress one with American citizenship. The qualifications for American citizenship are set forth in the federal Constitution and laws. Some states require the possession of American citizenship as a condition precedent to voting. Others require only a certain residence together with a declaration to become a citizen of the United States. Qualifications for electors are left to the states, and it often happens that persons not citizens of the United States cast their votes in, and may even decide national elections.

Citizenship may be acquired either by birth, through process of naturalization, or by revolution. Citizenship by birth may be gained by birth in a particular place, under the *jure soli*. The early common-law doctrine conferred citizenship on all persons born in a particular country. This doctrine became a part of American jurisprudence, and was generally applied by the Secretaries of State, the Department of Justice, and the courts. By the Civil Rights Act of 1866, it was provided that "All persons born in the United States and not

subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States." By the fourteenth amendment to the Constitution, "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." The *jure soli* is therefore a part of our fundamental law. Secretary of State Hamilton Fish declared, in explanation of the amendment: "This is simply an affirmance of the common law of England and of this country, so far as it asserts the status of citizenship to be fixed by the place of nativity, irrespective of parentage. The qualification, 'and subject to the jurisdiction thereof,' was probably intended to exclude the children of foreign ministers, and of other persons who may be within our territory with rights of extraterritoriality." Thus, children born in the United States to diplomatic officers are not citizens under the *jure soli.* Children born to aliens sojourning only temporarily in the United States, or merely passing through the country, and soon removed to a foreign state, are uniformly held to have been born here, but sometimes not "subject to the jurisdiction" of the United States. It has been settled that the children of domiciled aliens born in the United States are citizens under the fourteenth amendment. This is true of the children of alien parents ineligible to citizenship through naturalization.

Citizenship by birth may also be founded on the *jure sanguinis,* or by right of blood, depending on the nationality of the parents. There is no constitutional provision on this source of citizenship, but it is regulated by section 1993 of the Revised Statutes of the United States (act of February 10, 1885), which provides: "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers have never resided in the United States." An illegitimate child born abroad to an American woman is not a citizen of the United States, nor are half-castes born in Samoa, of American fathers by Samoan women, with whom the fathers lived "fa'a Samoa," citizens of this country. The requirement of residence on the part of the father has been held not to apply to members of continuous communities of

American nationality existing in Turkey for business or religious purposes. Descendants who are members of such communities are regarded, through their inherited extraterritorial rights recognized by Turkey herself, as born and continuing within the jurisdiction of the United States. Within American sovereignty and jurisdiction, persons contemplated by this act have all the rights of American citizenship. The Congress did not intend, however, so to impress with American citizenship those who had never touched our shores as to interfere with the rights of control of the government of the place of birth. The fourteenth amendment, of more recent date and of higher authority than the law of 1855, must control in case of any conflict or difference between them. The proviso of the father's residence prevents an indefinite transmission of citizenship by persons who have never resided in the United States. By it "the heritable blood of citizenship was thus associated unmistakably with residence within the country, which was thus recognized as essential to full citizenship."

Citizenship may also be conferred by revolution. It has been held that persons born before the Declaration of Independence could elect either to retain their British allegiance, or to become a citizen of one of the states. The British allegiance became dissolved through this act on the date of the Declaration of Independence in the United States, and on the date of the treaty of peace of 1783 in England. This right of election is affirmed by all authorities on international law. There is some diversity of opinion as to the date when the election should take place. Persons who remained in the United States after July 4, 1776, were regarded as American citizens, but this presumption could be rebutted by proof of adhesion to Great Britain during the course of the War for American Independence.

II. American naturalization.

The Constitution of the United States has vested in the Congress the exclusive power to pass naturalization laws. The only requirement is that such laws shall be "uniform." If the law is made by its terms applicable alike to all the states of the Union, without distinction or discrimination, it is uniform. That its operation or working may vary completely in the different states does not establish a lack of uniformity. In pursuance of this authority, the Congress has

passed a number of laws for the admission of aliens to American citizenship. The first such law was passed on March 26, 1790. Beginning in 1868, the United States negotiated a number of treaties which have regulated naturalization to some extent. The entire population of a district or territory may be naturalized collectively, by legislative or conventional arrangement, subject to the principle of individual election. The ordinary method however, is to regard it purely as an individual act, and to require proof of intent of the applicant to dissolve his old allegiance and to acquire the new one. By the fourteenth amendment, "All persons . . . naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside."

Naturalization is a judicial act, which must be performed by the courts. By the act of June 29, 1906, exclusive jurisdiction to naturalize aliens as citizens of the United States was conferred upon the United States district and circuit courts, the United States district territorial courts, and Supreme Court of the District of Columbia, and any state or territorial court of record having a clerk, a seal, and jurisdiction in actions at law or equity in which the amount in controversy is unlimited. Since 1906 several territories have become states, and the United States circuit courts have been abolished. By section 41 of the act of March 2, 1917, Porto Rico was constituted a judicial district, and the district court empowered to naturalize aliens and Porto Ricans. Residence in Porto Rico was to count as residence in the United States. The state courts are not compelled to exercise the powers conferred by Congress. The state legislatures may regulate the proceedings of state courts in such matters, as forbidding any but certain courts to naturalize. Courts in annexed territory and courts maintained by ministers and consuls abroad do not have this right unless expressly conferred by Congress. As a general principle, the process of naturalization must be performed in the United States.

"Free white persons" only could be naturalized under the laws of 1802 and 1824. In 1870, process of naturalization was extended to "aliens of African nativity and to persons of African descent." The law now includes only "white persons" and persons of African descent. Slaves were never recognized as citizens, and the question of freedmen was not

settled until the fourteenth amendment finally determined the matter. According to the federal courts, "The term 'white person' must be given its common or popular meaning. As commonly understood, the expression includes all European races and those Caucasians belonging to the races around the Mediterranean Sea, whether they are considered as 'fair whites' or 'dark whites,' as classified by Huxley, and notwithstanding that certain of the southern and eastern European races are technically classified as of Mongolian or Tartar origin." Chinese are held to be neither of white nor of African blood, and hence not eligible to naturalization. By act of Congress of 1882, the courts are expressly forbidden to naturalize Chinese. Naturalization has been refused to Japanese, on the ground that they are not white persons. Burmese, being of the Mongolian race, are not capable of naturalization. Native Mexican citizens may be naturalized. American Indians are not within the general statutes relating to naturalization. They can be naturalized only by a special act of Congress, or by treaty. By the act of June 2, 1924, it is provided that "all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States."

The ordinary legal conditions of naturalization are: (1) A declaration of intention to become a citizen, made at least two years prior to admission to citizenship; (2) an oath of allegiance, made at the time of admission, and the renunciation of prior allegiance; (3) residence in the United States of at least five years, and in the state or territory where the court is held of at least one year; (4) behavior as a moral and orderly person during such residence; and (5) renunciation of any hereditary title or order of nobility.

The act of June 29, 1906, made important changes in the naturalization laws of the United States. Final action on the petition for admission to citizenship cannot be taken until 90 days after it has been filed and publicly posted. This virtually adds three months to the five year requirement. A certificate of naturalization cannot be issued within 30 days preceding the holding of a general election. The candidate must file his petition not more than seven years after his declaration of intention, or it ceases to be effective. The applicant must speak the English language except in certain specified cases. Polygamists or believers in the practice of

polygamy, persons opposed to or not believing in organized government, or belonging to or affiliated with organizations holding or teaching such belief or opposition, and persons who advocate the unlawful assaulting or killing of officers of the American or other organized governments because of their official character, are excluded from admission to citizenship. Certificates improperly obtained may be cancelled. A bureau of naturalization was established at Washington to keep records of naturalization. A naturalized person, returning to his native or other foreign country within five years after his naturalization, to establish a "permanent" residence, may be regarded as not having intended to become a permanent citizen, and his certificate may be cancelled as fraudulent, in the absence of evidence to the contrary.

III. Double allegiance.

"The doctrine of double allegiance," says John Bassett Moore, "though often criticised as unphilosophical, is not an invention of jurists, but is the logical result of the concurrent operation of two different laws." It may arise conceivably in three possible cases. The first is the conflict of the two methods of acquiring citizenship by birth — by right of place and by right of blood. When a child is born to parents in a country other than that of their allegiance, he is a citizen of two states, — of the state where he is born *jure soli*, and of his parents' country, *jure sanguinis*. If the claims of both states are urged, there is a definite conflict of laws, which is generally reconciled by the performance by the child of his duties of allegiance in the country where he actually resides. If neither or only one state urges its claims, no question will arise.

Again, a question of double allegiance will arise where the father of a child removes to a new country and acquires the allegiance of the country of his new residence. Conflicting claims of allegiance again arise. The child, upon attaining his majority, may elect the allegiance he desires to retain. A third case of double allegiance may result where one is a citizen of one country by birth, and of another by process of naturalization. This is true only where the right of expatriation is resisted or denied. The American doctrine recognizes the dissolution of the old tie through and upon the acquisition of the new one.

IV. Expatriation.

The Declaration of Independence mentioned definitely as among the "unalienable rights" with which all men were endowed by their Creator, "life, liberty, and the pursuit of happiness." The right of property is not expressly mentioned, although previous and subsequent reference was made to it. The colonists did not insist upon the right of the individual to expatriate himself at will. In fact, there was little discussion of it. While the Constitution gives to the Congress the power to pass uniform naturalization laws, nothing is said in regard to the claim of the state of first allegiance. The word expatriation means the loss of one's country by reason of a change of abode. A more precise meaning is the change both of home and allegiance. It comprehends not only the act of emigration, but also the process of naturalization. Does the act of naturalization invest the individual with a new political character, and at the same time dissolve the old political tie? Or does it invest him with a new allegiance without divesting him of the allegiance which he owes to the old?

The courts of the United States and authorities on jurisprudence held to the common law principle that a citizen cannot renounce his allegiance to the United States without the permission of the government, to be declared by law. In the absence of any legislative regulation, it was declared that the rule of the English common law remained unaltered. On the other hand, the laws of the United States required an alien, at the time of his admission to citizenship, to surrender his allegiance to his former sovereign. There was no disposition to consider or recognize the claims of one's prior allegiance. European states admitted to citizenship by naturalization, but recognized that the country of first allegiance might have claims. Moreover, the European states granted the right of expatriation very sparingly.

The United States regarded its own act of naturalization as divesting the individual of his former allegiance, and seemed at least to assume that this was his absolute right, to be exercised at will. On the other hand, we held to the view that an American citizen could dissolve the American tie only with the consent of his country, and that the process of naturalization in another state did not operate to divest him of it without this express consent. Conflicts of allegiance arose inevitably. Few cases arose in which the United States

sought to assert its claims of prior allegiance against an individual who had acquired and a state which had conferred the new tie. The great bulk of cases embrace the protection which the United States tried to extend to its newly naturalized citizens, against the claims of the states which refused to admit the dissolution of the tie.

This protection was extended to a certain extent when Great Britain impressed seamen in the service of the American merchant marine. It is true that our government protested against the impressment by England of seamen who were naturalized citizens of the United States, on the theory that their first real allegiance was Great Britain, the country of their birth. The chief objection was the exercise by Great Britain in time of peace of the belligerent right of visit and search, in order to give effect to the British law of indelible allegiance on American ships on the high seas, where only American municipal law and international law could apply.

The Irish famines and economic conditions in Germany led to a great influx of population from Ireland and the German states into the United States. Many were naturalized. Children were born who were citizens under the *jure soli*. Upon the return of these people to the old countries for visits or temporary sojourns, the states of their prior allegiance insisted upon the performance of the duties of that allegiance, and in some cases as a condition precedent to its relinquishment of its claims. The naturalized Americans naturally appealed to the country of their adoption for protection. Little headway could at first be made. By British law, a subject could change his allegiance only by act of Parliament, and there was no record of such an act. A Prussian subject could lose his allegiance in various ways. Residence for two years in a foreign land would dissolve the tie. The performance of military duties, however, was required as a discharge from Prussian allegiance. Our government could not logically ask for an absolute break from the old country when we too held to the doctrine of indelible allegiance as regards our own citizens. Secretary of State Buchanan insisted upon the right of expatriation for the individual, and sought to place the naturalized citizen on the same plane as the native, especially as regards national protection.

The ultimate American doctrine of expatriation was settled by the act of July 27, 1868. By it the right of expatriation is

held to be an inherent right of all people, and any restriction, impairment or denial of the right by officers of the government were declared to be "inconsistent with the fundamental principles of this government." Naturalized citizens were to have while abroad, "the same protection of persons and property that is accorded to native-born citizens in like situations and circumstances." When it appeared that citizens were unjustly deprived of their liberty by or under the authority of a foreign government, the President was directed to demand an explanation of the imprisonment, and if it then appeared unjust, to demand their release. If this was refused or unreasonably delayed, then the President was authorized to use such means short of acts of war as would be necessary to obtain the release. The President should then communicate the facts and proceedings to Congress.

The assertion of this municipal law by the United States could not change the attitude of the states of prior allegiance. Our government was committed to the law, and political pressure was brought against the government by many new citizens, who in many cases held the balance of power in elections. To press the issue too far might conceivably lead to war. To secure a recognition of the right by the countries of Europe would require a reciprocal recognition by the United States of the right of its own citizens to divest themselves of American nationality at will. The latter course was followed. In 1868, our government began to negotiate the series of naturalization treaties, commonly called the "Bancroft Treaties," since they were negotiated in the main by George Bancroft, who was the Minister of the United States to Prussia and the North German Confederation, and later to the German Empire. The treaty with the North German Confederation, for example, provided that a citizen of one, naturalized in the other and residing there five years uninterruptedly, loses his prior allegiance. The declaration of an intention to become a citizen should not have the effect of naturalization. Moreover, a naturalized citizen of one, returning to and residing for two years in the country of his prior allegiance, is regarded as having renounced his naturalization.

Certain changes were made by the act of March 2, 1907, in the law dealing with the expatriation of citizens of the United States and their protection abroad. The section dealing with expatriation reads:

Any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state.

When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state, it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: Provided, however, That such a presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: And provided also, That no American citizen shall be allowed to expatriate himself when this country is at war.

V. The citizenship of women.

The modes of acquiring citizenship which are open to men have also been open to women. Birth in the United States or birth abroad to American parents conferred American citizenship without regard to sex. Alien women can be naturalized under the laws of the United States in the same manner and under the same conditions that pertain to the naturalization of alien men. The widow and children of an alien who has died, but who has made a declaration of intention, are regarded as citizens upon taking the oaths prescribed by law. By section 1993 of the Revised Statutes, nationality is not inherited through women. In cases of inherited nationality, the general rule was that the wife and children were impressed with the nationality of the husband.

The marriage of alien women to Americans has until recently automatically covered such women with American citizenship. By the act of 1855, "Any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen." The law denied citizenship through marriage to women of races ineligible to naturalization. The law of 1907 stipulated that if a foreign woman married to an American continues, after the marital relation ends, to reside in the United States, she is assumed to retain her American citizenship; unless she renounces it before a competent court; but if she should reside abroad, she is permitted to retain it by registering within a year at an American consulate.

For a long time the statutes of the United States made no provision for the loss of nationality of an American woman

by her marriage with an alien. Secretary of State Hamilton Fish declared in 1876 that it had never been "incontrovertibly established" as the law of the United States that an American woman by marriage with an alien loses the quality of an American citizen. Mr. Blaine, as Secretary of State, declared in 1890 that "The view has been taken by this Department in several cases that the marriage of an American woman to a foreigner does not completely divest her of her original nationality. Her citizenship is held for most purposes to be in abeyance during coverture, but to be susceptible of revival by her return to the jurisdiction and allegiance of the United States." The law of 1907 expressly provided that an American woman marrying a foreigner took the nationality of her husband; but upon the termination of the marriage, she could resume her American citizenship, if abroad, either by registering within a year as an American citizen at an American consulate, or if she is already in the United States, by continuing to reside there.

The act of September 22, 1922, introduced fundamental changes in the rules which formerly applied to the citizenship of women. In the first place, the act provides that an alien woman may become a citizen by naturalization, even though her husband remains an alien. Marriage is therefore no bar to naturalization. Again, the marriage of an alien woman to an American citizen does not operate to impress her with American citizenship. To become such, she must resort to process of naturalization. Moreover, if an American woman marries an alien, she is deemed to retain her American citizenship unless she chooses to renounce it. If an American woman marries an alien ineligible to naturalization, she loses her American citizenship. Finally, if an American woman has lost her citizenship through marriage to an alien, she may regain it by naturalization.

The provisions of this law were designed to remedy what were alleged to have been certain inequalities respecting citizenship for women. Only its application will determine whether or not it will yield the results sought by its proponents. Its chief advantage would seem to lie in the fact that American women who marry aliens may retain their original allegiance. It should be observed, however, that under the law of her husband's country, she assumes her husband's nationality, and that the American law applies to her only as she is subject to

the jurisdiction and laws of the United States. To forbid citizenship to alien women who marry American men except by naturalization is to deny to all such women a mode of acquiring citizenship here which is open to American women under the same circumstances in practically every nation in the world. The American woman marrying the alien ineligible to naturalization is rendered stateless by this law unless she acquires the allegiance of her husband. Some of the clauses are at variance with international usage, and will inevitably result in conflicts of allegiance. It might, if pushed, revive the controversy over the doctrine of double allegiance, which was settled by the law of expatriation of 1868, and by the treaties of naturalization which followed. Instead of a conflict between an original allegiance and that acquired through naturalization, it would be a conflict between an original national character and one acquired through marriage.

VI. United States v. Wong Kim Ark (169 U. S. 469).

Wong Kim Ark was born in San Francisco in 1873 of Chinese parents who were subjects of the Emperor of China, but domiciled residents of San Francisco and the United States. They returned to China in 1890 accompanied by their son. The same year he returned to the United States without any difficulty. In 1894 he again visited China. He returned the next year, but was denied the right to enter the country on the ground that he was not a citizen of the United States. He was restrained of his liberty by the collector of customs of the port of San Francisco. He sued out a writ of *habeas corpus* in the United States District Court, which ordered his discharge on the ground that he was an American citizen. The United States appealed to the Supreme Court.

The question in the case was whether a child born in the United States of parents of Chinese descent and allegiance but permanently domiciled in the United States, is a citizen of the United States under that clause of the fourteenth amendment of the Constitution, which reads, " All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." The opinion of the court was delivered by Mr. Justice Gray:

1. The Constitution states who are citizens of the United States, but it does not define the terms used, as " citizens of

the United States," and "natural-born citizens of the United States." The Constitution must therefore in this respect as in others be interpreted in the light of the common law, "the principles and history of which were familiarly known to the framers of the Constitution."

2. "The fundamental principle of the common law with regard to English nationality was birth within the allegiance, also called 'ligealty,' 'obedience,' 'faith,' or 'power,' of the King." Children born in England of aliens were natural-born subjects, within the King's allegiance, and subject to his protection.

3. The same rule prevailed in all the English colonies until the Declaration of Independence, and in the United States both before and after the adoption of the Constitution.

4. There was not, at the time of the adoption of the fourteenth amendment, any settled or definite rule of international law, generally recognized by civilized nations, which was inconsistent with the ancient rule of citizenship by birth within the dominion. Moreover, it cannot be doubted "that it is the inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what classes of persons shall be entitled to its citizenship." The Roman law rule that the citizenship of the child follows that of the parent does not displace the regulation of the municipal law.

5. "The fourteenth amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. The amendment, in clear words and in manifest intent, includes the children born, within the territory of the United States, of all other persons, of whatever race or color, domiciled within the United States."

6. The courts must give effect to the clear and explicit language of the fourteenth amendment as it applies to this case. The naturalization laws are vested exclusively in Congress, but it is a power to confer citizenship, and not to take

it away. The Congress has not extended the right of naturalization to the Chinese. As all statutes must yield to the "paramount and supreme law of the Constitution," so must legislative and executive acts in this case yield to what the Constitution provides.

7. Wong Kim Ark is a citizen of the United States under the fourteenth amendment, on the theory of birth within the dominion, and is entitled to enter the country.

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CHAPTER XXX

THE FIFTEENTH AMENDMENT

I. Suffrage regulations prior to the fifteenth amendment.

The first half of the nineteenth century was marked by the abolition of property qualifications on the part of the states. Suffrage reform, however, did not include the free negroes, except in a few states. With the freedom and citizenship of negroes guaranteed by the thirteenth and fourteenth amendments respectively, it was deemed necessary to introduce clauses into the latter amendment bearing on the suffrage question. It was provided in the Constitution that three-fifths of the slaves should be counted in determining the basis of a state's representation in the House of Representatives. Under the second section of the fourteenth amendment, representatives are apportioned among the states according to their total population, excluding Indians not taxed. Moreover, when the right to vote at a state or federal election is denied to an adult male citizen of a state, except for crime, the basis of representation for the state in Congress is to be proportionately reduced. A state might disfranchise any class of persons, but the state faced a loss of representation in Congress. These measures were regarded only as steps toward the enfranchisement of the negro, which was accomplished by the fifteenth amendment, adopted in 1870.

II. Provisions of the fifteenth amendment.

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any of the states on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce the provisions of this article by appropriate legislation.

III. Interpretation of the fifteenth amendment.

A. The Slaughter House Cases (16 Wallace 36). Judge Miller, in rendering the decision in this, the first case to come before the Supreme Court under the " reconstruction amend-

ments," explained the purpose of the fifteenth amendment in the following statement:

> A few years' experience satisfied the thoughtful men who had been the authors of the other two amendments that, notwithstanding the restraints of those articles on the states, and the laws passed under the additional powers granted to Congress, these were inadequate to the protection of life, liberty and property, without which freedom to the slave was no boon. They were in all those states denied the right of suffrage. The laws were administered by the white man alone. It was urged that a race of men distinctively marked as was the negro, living in the midst of another and dominant race, could never be fully secured in their person and their property without the right of suffrage.
>
> Hence the fifteenth amendment. . . . The negro having by the fourteenth amendment been declared to be a citizen of the United States, is thus made a voter in every state in the union.

B. Neal v. *Delaware* (103 U. S. 370). The court decided that certain provisions of the Constitution and laws of Delaware, limiting jurors to white persons qualified to vote, were *ipso facto* annulled by the adoption of the fifteenth amendment.

C. Ex parte Yarborough (110 U. S. 651). A part of the Civil Rights Acts provided punishment for conspiracy " to injure, oppress, threaten or intimidate any person in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States." A petition for a writ of habeas corpus to release several persons convicted in the United States Circuit Court for the Northern District of Georgia of conspiracy to intimidate a negro from voting at a congressional election, was made. The writ was denied.

Decision of the court.

1. The fifteenth amendment " does, *proprio vigore,* substantially confer upon the negro the right to vote, and Congress has the power to protect and enforce that right."

2. A vote for a member of Congress depends to some extent upon the Constitution of the United States, and not exclusively upon the laws of the state.

3. The power of Congress to protect the citizen in the enjoyment of his rights is " essential to the healthy organization of the government itself.

4. This portion of the Civil Rights Acts is a lawful use of the power granted to Congress to enforce the fifteenth amendment.

D. Williams v. *Mississippi* (170 U. S. 214). It was held in this case that a state may establish a literacy test for electors which applies to all persons, with no discrimination against colored persons as such, even though its application disfranchises more of one race than another. It follows, therefore, that the fifteenth amendment does not confer suffrage directly upon the negro, and that it does not restrict qualifications of sex, age, education, property, or birth.

E. The "grandfather clause." This clause, adopted in several states, in effect excludes from suffrage practically all negroes who do not satisfy the educational and property tests, but includes a number of white persons who do not have these qualifications. Where a state, by statute or Constitution, excepts from the literacy test any person who was, on January 1, 1866, or any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and any lineal descendant of such person, the provision is unconstitutional on the ground that its purpose and effect is to disfranchise former negro slaves and their descendants, in violation of the fifteenth amendment. (*Guinn* v. *United States,* 238 U. S. 347; *Myers* v. *Anderson,* 238 U. S. 368.)

F. Application and effect of the fifteenth amendment. The fifteenth amendment, directed against the action of states, and not individuals, does not authorize federal legislation to punish conspiracy on the part of private persons to prevent negroes from voting. (*Jones* v. *Bowman,* 190 U. S. 127.)

This amendment limits the federal government as well as the states.

Congress may enforce the fifteenth amendment directly, but little has been done in this direction. Very few state acts have been found by the courts to violate it. The Southern states have succeeded in limiting the right of the negro to vote through legislation which has been upheld by the Supreme Court.

READING

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MURPHEY. *Problems of the Present South.*
PAGE. *The Negro, the Southerner's Problem.*
PORTER. *History of Suffrage in the United States.*
TILLINGHAST. *The Negro in Africa and America.*
WARREN. *The Supreme Court in United States History,* Vol. III, pp. 322*n.*, 324, 333, 337, 339.
Guinn v. *United States,* 238 U. S., 347.

CHAPTER XXXI

THE INCOME TAX CASES AND THE ADOPTION OF THE SIXTEENTH AMENDMENT

I. The Constitutional provision regarding taxes.

The Constitution at first provided that representatives and direct taxes should be apportioned among the several states according to population. No capitation or direct tax could be laid, unless in proportion to the census arranged for in the Constitution. Moreover, Congress was given the power to lay and collect taxes, duties, imposts and excises. Duties, imposts and excises must be uniform throughout the United States.

The phrase "direct taxes" was coined by Gouverneur Morris during the Constitutional Convention. He desired that taxation should be in proportion to representation, and suggested that suffrage be restricted to landholders. Morris was interested especially in giving wealth its legitimate weight in representation.

II. Hylton v. United States (3 Dallas 171).

The Supreme Court held that an annual tax on a carriage for the conveyance of persons was constitutional, because it did not lay a direct tax. The judges inclined to the view that direct taxes included only capitation and land taxes. Hamilton, in his brief for the government, declared: "The following are presumed to be the only direct taxes: Capitation or poll taxes, taxes on lands and buildings, general assessments, whether on the whole property of individuals, or on their whole real or personal estate. All else must of necessity be considered as indirect taxes."

Chief Justice Fuller, in the case of *Pollock* v. *Farmers' Loan and Trust Co.* (157 U. S. 429), declared that from the decision in the *Hylton* case, the following appeared:

1. The distinction between direct and indirect taxation was well understood by those who framed and adopted the Constitution.

2. Under the state systems of taxation, taxes on real estate

or personal property, or the rents or income thereof were regarded as direct taxes.

3. The rules of apportionment and uniformity were adopted in view of that distinction and those systems.

4. Whether the tax on carriages was direct or indirect was disputed, but the tax was sustained as a tax on the use and as an excise.

5. The original expectation was that the power of direct taxation would be exercised only in extraordinary exigencies.

III. Springer v. United States (102 U. S. 586).

The court considered the income tax law of 1865, passed following the Civil War to provide revenue to meet war expenses. The income in question was not derived from real estate, but in part from professional services as attorney at law, and in part from interest on United States bonds. The law was sustained on the ground that it was not a direct tax. The court declared: "Our conclusions are that direct taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate; and that the tax of which the plaintiff in error complains, is within the category of an excise or duty."

IV. Pollock v. Farmers' Loan and Trust Co. (157 U. S. 429; second case, 158 U. S. 601).

The economic and political situation in 1894 was such that an income law was passed on August 27, designed to shift a part of the burden of taxation to the East. This law imposed a tax of two per cent upon incomes in excess of $4,000 received by all persons, corporations, or associations (with certain exceptions) in the United States. Pollock, a stockholder in the defendant corporation, sought to enjoin the defendant from paying the tax on the ground of its unconstitutionality. The income of the corporation was derived principally from real estate, from municipal bonds, and from corporate stocks and bonds. Upon a dismissal of the bill on demurrer, an appeal was taken to the Supreme Court.

Decision of the court. In the first case, the majority of the court agreed upon the following conclusions:

1. A tax on income derived from real estate is a direct tax. Congress is, therefore, prohibited to lay such a tax.

2. A tax on income derived from state and municipal bonds

was held invalid because it was a tax on the necessary instruments of government.

The court was equally divided on the following questions:

1. Whether a tax on income from corporate stocks and bonds or other personal property was a direct tax.

2. Whether the entire statute was invalid, due to the provisions expressly held so by the Supreme Court.

On May second, the court rendered its decision in the second case. The majority laid down these propositions:

1. Taxes upon real estate, or rents on real estate, are direct taxes.

2. Taxes on stocks and bonds, or other forms of personal property, or income from personal property, are direct taxes.

3. These taxes are invalid because they are unequal.

4. Since the largest part of the tax, that on capital, was inoperative, it was held that the remaining tax, that on incomes from occupations and labor, should fail also, on the ground that Congress could not have intended the latter tax alone.

V. The adoption of the sixteenth amendment.

Bitter attacks were made on the decision in the Pollock case. The case was cited as an illustration of the leanings of the court toward capital. A plank attacking the judiciary and the decision as favoring the so-called propertied class was inserted in the Democratic platform in 1896. Mr. Bryan charged that one judge (Shiras) changed his mind, and the tax was thus held invalid. Both the Democrats and the Populists made the income tax law an issue in the campaign. In 1908 the Democratic platform proposed an amendment to the Constitution allowing the laying of an income tax without regard to population. President Roosevelt had advocated an inheritance tax and an income tax in a message to Congress in 1907. An inheritance tax, passed in 1898 as a war measure, had been sustained, but was repealed. The aim of the Republicans was to silence Bryan by taking his policies. The conservative elements of the party dictated the platform, and nothing more was said about an income tax. Taft, in his speech of acceptance of the Republican nomination, declared himself to be personally in favor of an income tax. He was of the opinion that a law could be framed which would meet the objections of the Supreme Court. In 1909, the Republican

Congress proposed to attach an income tax clause to the general revenue bill in spite of the decision of the Supreme Court. A long debate followed, and President Taft proposed an income tax amendment, which was adopted in 1913. It reads:

> The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration.

READING

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BURDICK. *Law of the American Constitution,* pp. 185–190.
SELIGMAN. *The Income Tax.*
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Cases cited in this Section as they appear in the *United States Supreme Court Reports.*

CHAPTER XXXII

THE SEVENTEENTH AMENDMENT

The plan of the framers of the Constitution was to establish a permanent conservative element in the government. A simple majority at the polls was feared. The position of the " founding fathers " is stated in Number 10 of the *Federalist*. Popular election of Senators was proposed by Wilson, but it was finally agreed to leave their election to the state legislatures.

The popular election of presidential electors was introduced into all the states except South Carolina, during the Jeffersonian democracy, but, curiously enough, no demand was made for the popular election of Senators. A resolution providing for popular election was introduced during John Quincy Adams' administration, but little attention was given it. Andrew Johnson favored it as President. The subject was agitated to some extent during the Granger movement of the seventies. The Populists were the first to incorporate it as a plank in their platform in 1892. The Socialists followed in 1896, and the Democrats in 1900, and in subsequent platforms. The matter became an issue in 1908. The Republican platform of that year was silent on the subject, but Taft declared himself as personally in favor of the principle.

An amendment called for by the House of Representatives passed by the necessary two-thirds vote in 1893. It passed in 1894, 1898, 1900, and periodically thereafter. The Senate persistently refused to give its consent. States then began to elect in effect by primary methods. Oregon in 1904 provided for the referendum, and for the election of Senators extra-officially. Members of the legislature promised to vote for the people's choice. Senator Chamberlain, though a Democrat, was elected by a Republican legislature, due to the instructions coming from the people. By the year 1910, three-fourths of the states had adopted some form of primary election of Senators. Due to this extra-constitutional practice, the character of the Senate was correspondingly changed. The Senate approved the amendment in 1911, and it was ratified by the states in 1913.

The amendment provides that Senators shall be elected by the people of each state. Electors must have the same qualifications as electors of the most numerous branch of the state legislature. In case of vacancies, the governor of the state issues a writ of election to fill the vacancy. The state legislature may authorize the governor to make a temporary appointment until the election is held.

READING

BEARD. *American Government and Politics,* 4th ed., pp. 238–241.
HAYNES, G. H. *The Election of Senators.*
LODGE. *The Senate of the United States.*
Newberry v. *United States,* 256 U. S., 232.

CHAPTER XXXIII

THE EIGHTEENTH AMENDMENT

I. Political aspects.

Several years preceding the Civil War, several states adopted prohibition in the wake of a very pronounced temperance movement. The interest in this question yielded to the dominant slavery issue and the Civil War. The Prohibition party definitely entered the political arena in 1872, by holding a national convention, drafting a platform, nominating a candidate, and, what is more important, organizing a political party. Candidates and platforms were submitted periodically thereafter, with little visible success. In time the prohibition issue was championed by leaders of the old parties, notably Mr. W. J. Bryan of Nebraska. The Anti-Saloon League was organized, its objective being the elimination of the saloon through state and local action. Many localities and a number of states entered the "dry column" through popular elections. Everywhere prohibition was an issue in local politics, and the communities of the nation rallied and fought under the "license" or "local option" camps.

Many prominent Americans who favored the principle of settling questions by localities were not in sympathy with prohibition as a national issue. The nation, and even the states, was regarded as too large a unit. The most distinguished statesman holding to this theory was Mr. Woodrow Wilson, who championed the American doctrine of local self-government. It is one of the ironies of history that both war-time and constitutional prohibition were adopted during Mr. Wilson's second administration.

Up to 1917, eleven states had constitutional prohibition, ten states had statutory prohibition, and five others had prohibition laws or amendments under way. In 1917, Congress forbade the manufacturing and importation of spirituous liquor for beverage purposes during the period of the war.

II. The adoption of the amendment.

In December, 1917, Congress adopted the prohibition amendment to the Constitution and submitted it to the states.

It was ratified by forty-six states, proclaimed in January, 1919, and put into effect by its own provisions January 16, 1920. The amendment reads:

Section 1. After one year from the ratification of this article, the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes in hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

III. Interpretation of the eighteenth amendment.

A. National Prohibition Cases (253 U. S. 221). In these cases, the constitutionality of a constitutional amendment was definitely attacked. The general contention was that the eighteenth amendment had overridden the implied limitations of the amending power under the Constitution. The following contentions and answers were submitted to the Supreme Court:

1. The so-called eighteenth amendment is not really an amendment, the function of which is to change or improve existing provisions of the Constitution, and not to add grants of power hitherto unknown to the Constitution.

An examination of the records of the Constitutional Convention and of the ratifying convention disclosed that the framers intended that changes of any kind mustering the requisite support could be made at any time, excluding those expressly excepted in the amending clause.

2. The eighteenth amendment is not an amendment within the meaning of the Constitution, for the reason that it is in its nature legislation. An amendment to the Constitution can deal only with the powers of government. Action directly upon the rights of individuals is essentially a legislative power.

In reply, it was contended that this proposition pointed to what the amendment should or should not be, rather than to what amendments were constitutionally possible to adopt. The thirteenth amendment was cited as an example of an amendment directed against individuals, even to the extent of depriving them of property.

3. "The Constitution in all its parts looks to an indestructible union of indestructible states."

a. This view is the basis of the Union, and any attempt to change it through amendment is beyond the power conferred by the fifth article of the Constitution.

b. The delegated amending power cannot extend to anything which would lead to the destruction of either the United States or the individual states.

c. The states can, through the police power, protect the health, safety, morals and general welfare of their citizens. Prohibition is included under the police power, and the states only can legislate respecting it.

d. If a part of the police power can be transferred to the federal government, the residue of police power and other fundamental state powers can be so transferred, which will make possible the destruction of the states by constitutional amendment.

e. The first ten amendments limited the amending power, especially as regards the rights retained by the people, and the powers reserved to the states or to the people.

In answer to the third contention, it was urged that an unalterable governmental system was not in the minds of the framers, but they definitely intended to provide a means for necessary changes. It was pointed out that Sherman feared that three-fourths of the states might abolish certain states altogether, or deprive them of their equality in the Senate. Accordingly he moved that no state should be affected in its internal police or deprived of its equal suffrage in the Senate, which was lost. The ninth and tenth amendments were regarded merely as a part of the Constitution, and subject to amendment. The fourteenth amendment was held up as a precedent for limiting the police power of the states through an amendment to the Constitution.

While these cases might properly be discussed under the amending clause, it settled that amendments of a moral character may find a definite place in the Constitution. On this point, the court declared:

> The prohibition of the manufacture, sale, transportation, importation and exportation of intoxicating liquors for beverage purposes, as embodied in the eighteenth amendment, is within the power to amend reserved by Article V of the Constitution.

The Supreme Court, in addition to upholding the constitutionality of the amendment, maintained these propositions:

1. The concurrent power of enforcement conferred upon Congress and the states does not enable either to defeat or thwart the prohibition, but only to enforce it by appropriate means.

2. The term " concurrent power " does not mean joint power, or state approval of congressional enforcement legislation, or a division of power similar to that which distinguishes foreign and interstate commerce from intrastate affairs.

3. The power given Congress by the second section, while not exclusive, is territorially co-extensive with the prohibition of the first section. It is not dependent on or affected by action or inaction on the part of any or all of the states.

IV. Application and effect of the eighteenth amendment.

The amendment does not state what percentage of alcohol is required to make a beverage intoxicating. Many people contended that liquors containing three per cent, or even more, alcohol were not intoxicating. The enforcement law, commonly called the " Volstead Act," placed the maximum percentage of alcohol at one-half of one per cent. Moreover, the office of prohibition commissioner was created, in the internal revenue bureau of the Treasury department, charged with the large responsibility of enforcing prohibition. In regard to the definition of intoxicating liquors by the Volstead Act, the Supreme Court said:

> While recognizing that there are limits beyond which Congress cannot go in treating beverages as within its power of enforcement, we think those limits are not transcended by the provision of the Volstead Act (Title II, Sec. 1), wherein liquors containing as much as one-half of one per cent of alcohol by volume and fit for use for beverage purposes are treated as within that power.[1]

Concerning the effect of the eighteenth amendment, that acute observer of American politics, Professor Charles A. Beard, has significantly remarked:

> Naturally, a law striking at the root of such age-long habits, is the subject of much adverse criticism. It is repeatedly said that the Amendment was " forced upon the people "; but it must be remembered that three-fourths of the states were already " dry " by popular vote and that forty-six out of forty-eight states ratified the Eighteenth Amendment. It is said that the law cannot be enforced; that is a matter of degree and of administration. As the agents

[1] National Prohibition cases (1920) 253 U. S. 350, 387.

chosen to enforce the act were selected in accordance with the letter and spirit of the spoils system, it is not surprising that there has been great inefficiency, to say the least. Still, during the eighteen months ending December 31, 1922, there were more than 27,000 convictions under the Volstead Act, and over $5,000,000 was collected in fines. It may be, as alleged, that the Volstead Act is unduly stringent in its definition of intoxicating liquor and that modifications of that ruling are forthcoming, but notwithstanding all the scandals and excitement connected with "rum running" and "bootlegging," there are no signs of a return to the old days of the wide-open saloon.[2]

READING

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CHAMBERLAIN. "Enforcing the Volstead Act through State Agencies," *American Bar Association Journal,* June, 1924, pp. 391–394.
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"Prohibition and its Enforcement," *Annals of the American Academy of Political and Social Science,* Vol. CIX, No. 198.
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Ruppert v. *Caffey,* 251 U. S., 264.
Dillon v. *Gloss,* 256 U. S., 368.
Cunard Steamship Company v. *Mellon,* 262 U. S., 100.

[2] Beard, *American Government and Politics* (4th ed.), pp. 404–405.

CHAPTER XXXIV

THE NINETEENTH AMENDMENT

I. Minor v. Happersett (21 Wallace 162) and the fourteenth amendment.

One Mrs. Minor sued the registrar of voters of a Missouri district for refusing to place her name on the eligibility list of persons to vote for presidential electors and other officers. She was born in the United States, subject to its jurisdiction, and had all voting qualifications except that of sex. Under the Missouri Constitution, suffrage was limited to adult males. Mrs. Minor contended that one of her privileges as a citizen was the right to vote, and that under the fourteenth amendment this right had been abridged by the act of the registrar of voters.

Decision of the court.

1. Mrs. Minor's citizenship was established.
2. Her citizenship did not necessarily flow from the fourteenth amendment.
3. The right to vote was not necessarily a privilege or immunity before the adoption of the amendment.
4. The amendment only guaranteed such privileges and immunities as the citizen enjoyed when adopted, and did not create new ones.
5. Suffrage was not one of the existing privileges.
6. The states, and not the United States, could qualify voters.
7. There was no invasion of Mrs. Minor's privileges or immunities as a citizen of the United States by the registrar's act.

II. Political phases of the amendment.

The woman suffrage movement, like the prohibition movement, gathered momentum slowly but surely. New Jersey allowed women to vote before the end of the eighteenth century. In 1838, Kentucky allowed women to vote in school elections. Kansas followed in 1861. In 1869, the territory of

Wyoming gave women the same rights as men in elections for territorial officers. By the end of the nineteenth century, Colorado, Idaho, Wyoming and Utah had adopted woman suffrage. The "Susan B. Anthony" amendment was introduced in Congress as early as 1868. At first, it gained little support. Ridicule was the first reward. The advocates of the measure contended that most women have the same interests as men, in that they are property owners, tax-payers, professional workers or wage earners. Moreover, woman suffrage is essential to sex equality. Women, it was declared, would have a purifying influence on politics. The opponents hotly replied that women belonged in the home; that they are adequately represented at the polls by their fathers, brothers, and husbands; that women can accomplish more through non-political means than through political activity; that the interest in voting would subside along with the novelty of the thing; and that an increase in the electorate would increase expenditures.

Failing national action, the supporters of the measure gave their attention to the states. By the year 1917, twelve states had admitted women to vote at all elections, and many others had provided a limited franchise for women. The leading parties in 1916 endorsed equal suffrage through state action. The Progressive party championed the enfranchisement of women by national action. President Wilson, during his first administration, declared that as the leader of the Democratic party, he was bound by the position of the party on this question, irrespective of his position personally. Later, after war had been declared against Germany, he asked the Congress in a special message to submit a suffrage amendment, declaring that the country needed the help of its women, and that without them "we are only half free." On June 4, 1919, the nineteenth amendment was adopted by Congress, and on August 28, the necessary three-fourths of the states was completed by the ratification of Tennessee. It became effective immediately.

III. Provisions of the amendment.

The amendment reads:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of sex.
>
> Congress shall have power to enforce the provisions of this article by appropriate legislation.

READING

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BEARD, C. A. and M. R. *History of the United States,* pp. 554–568.
HARPER. *Life and Work of Susan B. Anthony.*
OGG. *National Progress,* pp. 151–156, 382.
PORTER. *History of Suffrage in the United States,* pp. 135–145, 228–254.
Leser v. *Garnett,* 258 U. S., 130.
Fairchild v. *Hughes,* 258 U. S., 126.
Hawke v. *Smith,* 253 U. S., 231.

CHAPTER XXXV

THE PROTECTION OF CIVIL RIGHTS

I. The problem.

It is not uncommon in time of war that civil rights should be invaded. The old maxim — *inter arma leges silent* — implies that the laws are silent during war. When nations are struggling for victory at arms, violations of law must follow, because the business of the state is first to win the war, and then to protect the citizen. The ordinary laws and administrative methods are often found to be inadequate, and must yield to policies and measures which are in the interests of public necessity. The maxim has been applied to international law. It is true that the laws of war which govern the relations of belligerents, and the laws of neutrality, which govern the relation of belligerents and neutrals, are often violated. Its origin and application, however, belong more properly to municipal law, public and private. Sometimes the ordinary law and administration gives way to martial law, under which the usual civil rights are suspended. The law is said to be that of the general who commands the army, but local laws, customs, and regulations are usually continued, if they do not conflict with the military measures of the government. It often happens that certain rights are restricted, even though martial law is not declared. In both the Civil War and the World War, the question arose as to the extent to which the war power could supersede the personal guaranties of the Constitution. Such conflicts necessarily arise. A policy of restriction during time of war is generally followed by a liberal policy in time of peace. The conflict must and can only be resolved in the interest of the public good. The fact of restriction, however, did not indicate that the laws had fallen to the ground, and that the Constitution had seen its day.

The position of the United States, upon its entry into the world war, was a difficult one. Three years of neutrality under difficult conditions, and the election of President Wilson in 1916, indicated a reluctance on the part of the masses to be

drawn into the conflict if it could be prevented honorably. Many citizens were of mixed blood, and held conflicting sympathies. Official neutrality was urged and followed, but mental neutrality became impossible. Many of these sympathizers had not become citizens. In addition to those whose foreign loyalty exceeded their American allegiance, were many who were opposed to war on principle, and those who believed that war at the time was inopportune or unjust. The Espionage Act of 1917 was passed to restrain those whose conduct was uncertain, or whose loyalty was open to question. It forbade, under penalty of $10,000 fine and twenty years imprisonment, or both, the making and circulation of false reports designed to check American military success or to promote the success of the enemies; prohibited attempts to cause insubordination, mutiny, disloyalty, or refusal of duty in the military or naval forces; and made punishable the willful obstruction of the recruiting or enlistment service, to the injury of the service, or of the United States. Use of the mails in violation of the law, or for advocating treason, insurrection, or forcible resistance to law was punished heavily. Conspiracy to effect these forbidden acts was punishable.

The Attorney-General of the United States claimed that the law was not drastic enough. In 1918, the Congress changed the clause forbidding persons to "obstruct" the enlistment service to read "attempts to obstruct." The new act forbade statements and acts intended to obstruct the sale of bonds and other securities issued and sold to finance the war; the use of word or pen in bringing the form of government, the Constitution, the armed forces, the flag, or the uniform of the army or navy into disrepute; the use of language to promote the enemy cause or to retard the American cause; the display of enemy flag; the urging of curtailment of production of the essential things leading to victory; the advocacy, teaching, defense or suggestion of any of these acts; and the supporting or favoring by word or act the enemy cause, or opposing the cause of the United States. So comprehensive an act would permit the Department of Justice to "get its man," where such was its policy. Only the courts could be looked to, both to prevent unreasonable interference with the war measures of the government under the war power, and to prevent arbitrary acts of government in violation of civil rights.

Another war measure was the selective service law. It re-

quired men between certain ages to register for military service, and upon call, to answer for such service. Cases arose, involving men conscientiously opposed to war, and men who deliberately sought to escape service because of its inconvenience.

II. Schenck v. United States (249 U. S. 47).

One Schenck was charged with conspiracy to violate the Espionage Act of 1917 by causing and attempting to cause insubordination in the naval and military forces of the United States, and by obstructing the recruiting and enlistment service of the United States when the United States was at war with the German Empire. He was also charged with conspiracy to use the mails for the sending of matter declared unmailable by the same statute.

Schenck was general secretary of the Socialist party, and had been instructed by the executive committee of his party to see to the printing and circulation of leaflets. Some were sent to men who had passed exemption boards. Some were sent through the mails to drafted men. Some were for general distribution. The evidence showed conclusively that Schenck had a large part in the circulation.

The documents cited the amendment (the thirteenth) abolishing slavery, and alleged the Conscription act to be in violation of it. A conscript was declared to be little better than a convict. It declared conscription to be a wrong against humanity and in the interest of Wall Street's favored few. Men were advised not to submit to intimidation, and to assert their rights. Not to do so by opposing the draft would be in itself a violation of the Constitution and a denial or disparagement of rights of citizens and residents of the United States. The right to send our citizens to foreign shores for military purposes was denied. The lower court found Schenck guilty on all counts. He claimed protection under the first amendment, which forbids Congress to make any law abridging the freedom of speech or of the press.

Mr. Justice Holmes delivered the opinion of the court. He admitted that in many places and in ordinary times the defendant would be clearly within his rights in what was done. "But the character of every act depends upon the circumstances in which it is done." The protection of free speech does not protect a man in falsely shouting fire in a theatre

and causing a panic, nor does it protect a man from an injunction against uttering words that may have the effect of force. Punishment under the statute does not depend on successful obstruction of recruiting. Conspiracy to obstruct will convict. The court declared:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance would not be endured so long as men fight and that no court could regard them as protected by any constitutional right.

The decision of the court below was upheld.

III. Selective Draft Law Cases (245 U. S. 366).

The Selective Service Act of May 18, 1917, made all male citizens between the ages of 21 and 30 subject to military service, and authorized the President of the United States to constitute an army of a million men from these citizens. Certain classes were given absolute or conditional exemption upon application and proof of status to the draft boards. Men affected by the legislation were required to report to certain places at an appointed time for registration. The defendants in these cases failed to appear, and were prosecuted and convicted for violating the draft law. They applied for writs of error, on the ground that the Congress had no authority to compel service in the army through a selective draft act. They declared that under the Constitution state citizenship was primary and United States citizenship was derivative and dependent thereon. The right of the Congress to raise armies was only coterminous with United States citizenship, which could not be exercised so as to dominate state citizenship. Again, it was declared that the right to provide an army is not denied by calling for volunteer enlistments, but it cannot and does not include the power to exact enforced military service by the citizen. In the third place, it was urged that enforced military service was repugnant to a free government and in conflict with all the great guarantees of the Constitution as to individual liberty. The right to raise armies, therefore, was limited to the right to organize an army only in

time of public need — war time, — and to recruit only from those who were willing to serve.

To these propositions Chief Justice White replied respectively that the power delegated to Congress by the Constitution to raise armies is supreme; that a governmental power which has no sanction to it and which can be only exercised provided the citizen consents to its exertion is in no substantial sense a power; and that " the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it." Such a right flows from the clauses of the Constitution giving Congress the power " to declare war; . . . to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; . . . to make rules for the government and regulation of the land and naval forces," and " to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

The Chief Justice showed that the right was recognized by international law, and that it was sanctioned by the English law. The right of the colonies to enforce military service was recognized both before and after the separation from England. No absolute right was conferred under the Articles of Confederation to call directly upon the citizen for military service, but each state engaged to raise and furnish its quota. Nine states provided for enforced service in their constitutions. Down to the Civil War the United States chose to recruit its forces only through the volunteer system. Its non-use did not operate to lessen the right. In the Civil and Great Wars, the draft was the ordinary method of raising the armies. This method was written into the Constitution of the Confederate states.

The provisions of the Constitution regulating the militia, and those authorizing the Congress to raise armies are different in their application. The first must take into account the states of the Union, while the second is entirely within the power and discretion of the federal government. The right to raise and support armies, therefore, includes the right to recruit them either through voluntary enlistments or by an enforced service.

The judgments of the lower courts were therefore affirmed.

IV. Abrams v. United States (250 U. S. 616).

Four young Russian aliens were charged and convicted of violating the Espionage Act. The oldest was one Abrams. They had printed pamphlets in English and Yiddish, and had scattered them on the streets. The leaflets in Yiddish asked the workers not to give their money and support to a war against Germany and also against the Russian proletariat. Munition workers were told that they were producing the instruments of war to destroy the Russians. A general strike, it was declared, should be the answer to American intervention in Russia. The English circular accused President Wilson of hypocrisy in his Russian policies. American capitalism, it was urged, should be prevented from crushing the Russian Revolution. The accused parties sought the protection of the first amendment to the Constitution, guaranteeing freedom of speech and of the press. They also disclaimed any intent to oppose the war.

The District Court held them guilty on four counts: the use of disloyal language about our form of government; the use of language intended to bring the form of government into disrepute; also to encourage resistance to the United States; and language designed to urge the curtailment of necessary war materials. A criticism of the administration was a criticism in effect of the form of government, said the court. They were therefore convicted on the first two counts. The court also held the leaflet to constitute encouragement to resistance and curtailment, and hence they were also held guilty of the last two counts.

The case was carried on appeal to the Supreme Court. The majority declared that "Men must be held to have intended, and to be accountable for the effects which their acts were likely to produce." The leading intent of the defendants was to aid Russia, but in doing so they were willing and intended to hinder and discourage the war against Germany. The leaflets expressly encouraged a curtailment of the manufacture of munitions, and a general strike. While the direct aim may not have been to cripple the government in prosecuting the war, it was clear that the consequences flowing logically from their action would have this effect. A suspension of production and a paralysis of industry could have nothing but this effect. The sentences of the court below were confirmed.

To this opinion Justice Holmes and Justice Brandeis dissented. They urged that there was no attack upon the form of government of the United States, and hence no violation under the first two counts. The main purpose, said Justice Holmes, was to prevent American intervention in Russia, and not to interfere with the war. While a man may know that certain results will flow from a certain act, he will not commit the act to produce it "unless the aim to produce it is the proximate motive of the specific act." A knowledge of consequences is therefore not proof of intent. Moreover, there was no evidence of real intent to incite some "forcible act of opposition to some proceeding of the United States in pursuance of the war." The dissenting opinion would therefore absolve them of all charges. A nominal punishment was urged for them, unless they would be held, not for the charges contained in the indictment, but for a creed, even a mistaken one, which could not as of right be regarded as a charge.

V. Post-war radicalism and reaction.

The Great War was hailed by many as the vindication of the modern democratic state. Some writers and speakers urged that the main issue was democracy against autocracy, representative institutions against monarchy, and that "kings must go." As the war progressed the word democracy became more and more the popular watchword. President Wilson introduced the idea of the democracy of peoples rather than that of governments. The movement in the course of time found its way into the enemy countries. The German people got rid of their monarchs, established a republic, and sought a peace on the basis of a new democracy dealing with older ones, and in keeping with the democratic bases of peace which had been laid down by President Wilson, the then spokesman of the allied nations — as a condition precedent to peace negotiations. The leading monarchs of Europe were deposed. The adoption of representative and democratic institutions has not been a cure-all for the ills of the new and even the old European bodies-politic. Genuine liberalism degenerated into radicalism, and many groups, formerly seeking the development of "social democracy" through orderly progress, identified themselves with the revolutionaries. When revolutionaries go mad, and a host of liberals join them, the only course left to the liberal who believes in constitutional government

is to join the conservative until the danger has passed. A combination between liberals and conservatives has often saved the state, and in saving the state, preserved the social order.

The radical movement had gained much headway in the United States by the close of the war. The Department of Justice held the view that the alien population, and especially the radical aliens, were responsible for the growth of this formidable movement, and for much of the resistance to both the war and peace aims of the government. By a law of 1918, aliens coming within certain classes were excluded from our shores, and those living here and coming under the classifications of the law could be deported. As a result many raids were conducted, many men held, and the ordinary rights extended under our Constitution and laws to aliens resident here were ignored. A group of prominent lawyers protested to the Department of Justice that the raids had been conducted and the aliens captured without " due process of law." The legislation described the aliens affected as follows:

> Aliens who are anarchists; aliens who believe in or advocate the overthrow by force of the Government of the United States or of all forms of law; aliens who disbelieve in or are opposed to all organized government; aliens who advocate or teach the assassination of public officials; aliens who advocate or teach the unlawful destruction of property; aliens who are members of or affiliated with any organization that entertains a belief in, teaches, or advocates the overthrow by force or violence of the Government of the United States or of all forms of law, or that entertains or teaches disbelief in or opposition to all organized government, or that advocates the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the Government of the United States or of any other organized government, because of his or their official character, or that advocates or teaches the unlawful destruction of property.

Another method of resisting the radical movement which attracted wide attention was the expulsion of five socialists from the lower house of the New York legislature. The men had been duly elected from certain assembly districts in New York City, and nothing irregular appeared in their election. They were charged with an attempt to take seats in the assembly when elected on a platform hostile to the interests of the state and the nation. The resolution of expulsion recited that the Socialist party and its members sympathized with Soviet Russia and was affiliated with the Third International; that it

stood for the destruction of government through violence; that the general strike and action *en masse* were advocated as a means to force and violence; that members of this party must agree to the party platform and constitution; that this constitution forbade office-holders to vote for appropriations for military purposes under the pain of expulsion; and that the Socialists had opposed the war measures of the government. Such representatives could not take an oath to support a state constitution which itself required a militia of ten thousand men.

Their expulsion rested chiefly on the grounds of the character of the organization to which they belonged. Their individual acts were evidential only of this one fact. Objection to this procedure was voiced in many quarters. The most notable protest came from Charles Evans Hughes. His objections were made, not on the grounds of the seditious or non-seditious character of the men or the organization to which they belonged, but on the ground of the denial of the right of representation to persons in electoral districts constituted by the laws for the express purpose of exercising this right. It was in effect a denial of majority representation in the districts where they had been elected, and of minority representation in the legislature. It was a procedure, said Mr. Hughes, "not against individuals charged with violation of law, but against masses of our citizens combined for political action, by denying them the only resource of peaceful government, that is, action by the ballot box and through duly elected representatives in legislative bodies." The New York City Bar Association was refused a request to appear before the judiciary committee in behalf of these men. The resolution of expulsion finally carried. This raises a new method of curbing the minority. The ordinary constitutional provision which makes a legislative body the judge of the qualifications of its members gives to a legislative majority the power to expel all members who incur its displeasure or oppose its measures. Should a minority be expelled because they are Democrats and not Republicans, or *vice versa,* no remedy could be applied until the electorate would decide the issue at the polls.

A searching analysis into the reactionary movement in the United States has been made by Mr. W. J. Ghent, formerly secretary of the Socialist party, in his valuable book, *The Reds Bring Reaction.* The change of front of the Socialist Party

of America he represented as a leap from the frying-pan into the fire, which yielded no relief. The collectivist, he declared, "has small desire to exchange a system under which, for all its defects, he has definite guarantees, a wide range of opportunities and a certain freedom of action, for one under which he would have nothing but the memory of what he had lost." The radical roads in America lead to Bolshevism and its sister creeds. He cited certain differences between so-called capitalism and Bolshevism. First, capitalism promotes political democracy, encourages wide differences of opinion and provides for the protection of the minority. Bolshevism openly repudiates popular rule. Again, capitalism allows its opponents to live, move and have their being, while Bolshevism seeks to get its opponents out of the way. Moreover, capitalism does not convict the individual offender by secret accusation, but by public trial according to long established forms. Under Bolshevism, the accused has no chance unless he is a defender of the régime. The situation would be the same in America, adds Mr. Ghent, "under any revolutionary group that succeeded in forcing itself into power."

The recent evolution of radical opinion in the United States is graphically described by Mr. Ghent as follows:

> The argument for a reconstructed order is for the moment lost, since there are so few who care to listen. Most of those who are not partisans either of the Right or of the Left are indifferent to social issues and concerned only with gain or enjoyment. With others, especially among the most exploited, there is dissatisfaction, resentment, unrest; and there comes from them a vague clamor against ill conditions. But they know not where to turn or what to do, and they are, for the time, skeptical of schemes and systems. There might be — and one may wonder why there is not — a strong Liberal or Progressive movement, animated by high purposes and guided by the sense of a more or less definite goal to be reached, able to organize this unrest into an effective demand for social justice. But the chaos of counsels has so far made all attempts in that direction futile. The one organized movement already in the field, the Socialist Party of America, which might have pointed a way, and which might, with some measure of success, have combated both these reactions, was itself caught in a reactionary tide which swept it first into Germanism, then into anti-Americanism, and later into Bolshevism; and though now, repudiated by both the Bolshevists of Russia and the Bolshevists of America, it has again turned somewhat toward its earlier policies, its power and its influence have been irretrievably lost. It has left a sorry record, which can never be expunged and never explained away.

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CHAPTER XXXVI

RECENT AND CONTEMPORARY CONSTITUTIONAL CONTROVERSIES

I. The proposed child labor amendment.

A. Political aspects. The regulation and prevention of child labor has been agitated by reformers for many years. Only within the last decade has the question received the direct attention of the government of the United States. The greatest opposition to the reform came from states where large numbers of children are employed. Notwithstanding this opposition, two laws were passed during the administrations of Woodrow Wilson, designed to control the employment of children. The law of 1916 established a national age limit for children employed in industry. The law of 1919 laid a heavy tax on the profits of companies using child labor. Both were held unconstitutional. The supporters of the measure then turned to their only remaining remedy — an amendment to the Constitution.

A proposal was presented to Congress for an amendment which would authorize a child labor law. President Coolidge, in his first message to Congress, December, 1923, gave the measure his unqualified endorsement. An extended discussion followed, with the result that the measure was adopted by both houses of the Congress, and now awaits ratification by the states. The Republican national platform of 1924 commended the "Congress for its prompt adoption of the recommendation of President Coolidge for a constitutional amendment authorizing Congress to legislate on the subject of child labor and we urge the prompt consideration of that amendment by the legislatures of the various states." President Coolidge, in his speech of August 15, 1924, accepting the Republican nomination for the Presidency, declared:

> Our different States have had different standards, or no standards at all, for child labor. The Congress should have authority to provide a uniform law applicable to the whole nation, which will protect childhood. Our country cannot afford to let anyone live off

the earnings of its youth of tender years. Their places are not in the factory, but in the school, that the men and women of tomorrow may reach a higher state of existence and the nation a higher standard of citizenship.

The actual status of child labor in the United States is disclosed by the census of 1920. More than a million children were then employed in the so-called gainful occupations. Four hundred thousand between the ages of ten and thirteen are so employed. The proportion of children employed between the ages of ten and fifteen reaches about twenty-five per cent in certain Southern states, as Alabama, Mississippi, and South Carolina, and declines to three per cent in the Pacific coast states. It is clear that this practice can only be remedied by federal action.

B. Hammer v. *Dagenhart* (247 U. S., 251). The Child Labor Act of 1916 prohibited any goods from being transported from one state to another if manufactured in any establishment where child labor under a certain age limit was employed. The decision of the court, holding the law unconstitutional, was as follows:

1. The prohibition or limitation of child labor in mines and factories, while desirable, must be decided by each state for itself.

2. Congress cannot fix age limits for children employed within a state.

3. The states of the North may fix their age limit for children to labor at 18, if they so desire; but this should not interfere with the right of the Southern states to fix the age at 12.

4. Congress has full power to regulate commerce, but cannot prescribe how states shall exercise their own police powers within their own borders.

5. Congress cannot exclude from the privilege of interstate commerce those who engage in the manufacture of legitimate commodities within a state where labor conditions differ from those prescribed by the Congress.

6. The law usurps powers reserved to the states under the tenth amendment. To uphold this principle would eliminate the control of states over local matters, and the dual system of government would be destroyed.

C. Bailey v. *Drexel Furniture Co.* (259 U. S. 20). The Child Labor Act of February 24, 1919, imposed a tax of ten

per cent on the net annual income of a person who employs one child or more in any mine or factory of the United States for even a single day. Chief Justice Taft delivered the opinion of the Court:

1. "Does this law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve? Or does it regulate by use of the so-called tax as a penalty? . . . a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?"

2. Grant such powers to Congress as this law implies, with its detailed regulatory features; "such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the states."

3. The difference between a tax and a penalty is sometimes difficult to define, yet the point is reached in some cases where "the so-called tax loses its character as such and becomes a mere penalty, with the characteristics of regulation and punishment."

4. The law before the court imposes such a tax, and cannot be sustained under either the tax or commerce clauses. Moreover, it is expressly prohibited by the tenth amendment.

D. Text of the proposed amendment:

Section 1. The Congress shall have power to limit, regulate, and prohibit the labor of persons under eighteen years of age.

Section 2. The power of the several States is unimpaired by this article except that the operation of State laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress.

E. State Action on the Amendment.

This proposed amendment commanded the necessary two-thirds vote in both the Senate and the House of Representatives, and was formally deposited in the Department of State on June 4, 1924. It has been ratified by Arkansas, Arizona, California, and Wisconsin. It has been definitely rejected by both houses of the legislature in Connecticut, Delaware, Florida, Georgia, Indiana, Kansas, Maine, Massachusetts,

Minnesota, Missouri, Nebraska, New Hampshire, North Carolina, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, and West Virginia. One house of the state legislature has refused ratification in Idaho, Louisiana, Michigan, Nevada, North Dakota, Ohio, Oklahoma, and Oregon. The fate of the amendment is clearly disclosed by this record.

The substantially uniform verdict in every region of the United States dispels the much heralded theory that resistance to this measure came chiefly from the South. In fact, some of the most bitter contests over ratification were fought in Northern states. The decision of the Massachusetts legislature was affirmed by the people of the state. The result does not show a lack of interest in humanitarian measures in the United States, nor should it discourage persons interested in child welfare and social reform. It indicates that the state legislatures and the people of the states have been impressed with the argument of the Supreme Court that such a proposal would invade the reserved powers of the states. This argument, used by the Court to curb unconstitutional legislation, has been used by the people to prevent such legislation from finding a permanent place in the fundamental law. The national government, it is felt, has invaded the special sphere of the states quite enough. The people also feel that their state governments can regulate the conditions of labor for children, without accepting the program of a national welfare organization. It also illustrates in a striking way the growing unpopularity of attempts to amend the Constitution in keeping with the provisions of every new piece of unconstitutional legislation.

II. The Constitution and social legislation.

A. The problem. The courts generally, and the Supreme Court of the United States in particular, have been criticised for being reactionary, and represented as opposed to advanced social legislation. Professor Frank J. Goodnow published, in 1911, a book entitled *Social Reform and the Constitution,* the purpose of which was to ascertain "to what extent the Constitution of the United States in its present form is a bar to the adoption of the most important social reform measures which have been made parts of the reform program of the most progressive peoples of the present day." In this volume,

Professor Goodnow states the demands of social and political reform in the United States, and by an actual examination of cases germane to the subject, discloses the extent of constitutional hindrance to social reform. His discussion embraces the following subjects: the constitutionality of uniform commercial regulation; the power of Congress to charter interstate commerce corporations; the power of Congress over the private law in force in the United States; the constitutionality of political reform; the constitutionality of government regulation; the constitutionality of government aid; and the attitude of the courts towards measures of social reform. In conclusion, he points out that criticism of the courts is no novel thing in our history, and cites instances to uphold this view. In regard to the effect of criticism of the court and its place in bringing about necessary social change, he said:

> It is by no means improbable that this severe, persistent, and continuous criticism of the court has been one of the influences which have brought it about that the court has on the whole been reasonably responsive to public opinion. In these days of rapid economic and social change, when it is more necessary than ever before that our law should be flexible and adapt itself with reasonable celerity to the changing phenomena of life, it is on this criticism amply justified by our history that we must rely if we are to hope for that orderly and progressive development which we regard as characteristic of modern civilization.

The view of Theodore Roosevelt on the relation between constitutional law and social policy, and the attitude of the judiciary toward social questions is shown in his message to Congress of December 8, 1908:

> The rapid changes in our social and industrial life which have attended this rapid growth have made it necessary that, in applying to concrete cases, the great rules of right laid down in our Constitution, there should be a full understanding and appreciation of the new conditions to which the rules are to be applied. What would have been an infringement upon liberty half a century ago may be the necessary safeguard of liberty today. What would have been an injury to property then may be necessary to the enjoyment of property now. Every judicial decision involves two terms — one, an interpretation of the law; the other, the understanding of the facts to which it is to be applied. The great mass of our judicial officers are, I believe, alive to these changes of conditions which so materially affect the performance of their judicial duties. Our judicial system is sound and effective at core, and it remains, and must ever be maintained, as the safeguard of those principles of

liberty and justice which stand at the foundation of American institutions; for, as Burke finely said, when liberty and justice are separated, neither is safe.

There are, however, some members of the judicial body who have lagged behind in their understanding of these great and vital changes in the body politic, whose minds have never been opened to the new applications of the old principles made necessary by the new conditions. Judges of this stamp do lasting harm by their decisions, because they convince poor men in need of protection that the courts of the land are profoundly ignorant of and out of sympathy with their needs, and profoundly indifferent or hostile to any proposed remedy. To such men it seems a cruel mockery to have any court decide against them on the ground that it desires to preserve "liberty" in a purely technical form, by withholding liberty in any real and constructive sense. It is desirable that the legislative body should possess, and whenever necessary exercise, the power to determine whether in a given case employers and employees are not on an equal footing, so that the necessities of the latter compel them to submit to such exactions as to hours and conditions of labor as unduly to tax their strength; and only mischief can result when such determination is upset on the ground that there must be no "interference with the liberty to contract" — often a merely academic "liberty," the exercise of which is the negation of real liberty.

The chief lawmakers in our country may be, and often are, the judges, because they are the final seat of authority. Every time they interpret contract, property, vested rights, due process of law, liberty, they necessarily enact into law parts of a system of social philosophy; and as such interpretation is fundamental, they give direction to all law-making. The decisions of the courts on economic and social questions depend upon their economic and social philosophy; and for the peaceful progress of our people during the twentieth century we shall owe most to those judges who hold to a twentieth-century economic and social philosophy and not to a long outgrown philosophy, which was itself the product of primitive economic conditions. Of course a judge's views on progressive social philosophy are entirely second in importance to his possession of a high and fine character; which means the possession of such elementary virtues as honesty, courage, and fair-mindedness. The judge who owes his election to pandering to demagogic sentiments or class hatreds and prejudices, and the judge who owes either his election or his appointment to the money or the favor of a great corporation, are alike unworthy to sit on the bench, are alike traitors to the people; and no profundity of legal learning, or correctness of abstract conviction on questions of social policy, can serve as an offset to such shortcomings. But it is also true that judges, like executives and legislators, should hold sound views on the questions of public policy which are of vital interest to the people.

Woodrow Wilson has dealt with the question of criticism of the Constitution in the following words:

The charm of our constitutional ideal has now been long enough wound up to enable sober men who do not believe in political witchcraft to judge what it has accomplished, and is likely still to accomplish, without further winding. The Constitution is not honored by blind worship. The more open-eyed we become, as a nation, to its defects, and the prompter we grow in applying with the unhesitating courage of conviction all thoroughly-tested or well-considered expedients necessary to make self-government among us a straightforward thing of simple method, single, unstinted power, and clear responsibility, the nearer we will approach to the sound sense and practical genius of the great and honorable statesmen of 1787. And the first step towards emancipation from the timidity and false pride which have led us to seek to thrive despite the defects of our national system rather than seem to deny its perfection, is a fearless criticism of that system. When we shall have examined all its parts without sentiment, and gauged all its functions by the standards of practical common sense, we shall have established anew our right to the claim of political sagacity; and it will remain only to act intelligently upon what our opened eyes have seen in order to prove again the justice of our claim to political genius.[1]

B. Adair v. *United States* (208 U. S. 161). In 1898 Congress passed a law forbidding railroads from discharging or discriminating against any employee because of membership in a labor union. The court maintained that every person has the right to buy or sell the labor of others or of himself, subject only to such restraints as contribute to the safety of the general public. No one was obliged under compulsion to accept or retain the employment of another, nor need anyone remain in the employ of another. A railroad can discharge a union man without assigning a reason. The law was held to deprive the employer of his liberty of contract without due process of law, and therefore void.

C. Bunting v. *Oregon* (243 U. S. 426). A statute of the Oregon legislature fixed hours of labor at ten hours a day, and limited overtime to three hours a day with pay at the rate of time and one-half. The law was held constitutional. The argument in the case was sociological rather than legal. A brief, prepared in the main by Mr. Brandeis before he became an associate justice, gave a comprehensive review of legislation dealing with hours of labor, and information concerning the effect of fatigue and overwork on employees.

D. Adkins v. *Children's Hospital* (261 U. S. 525). The Minimum Wage Act for women and children in the District of Columbia was passed September 19, 1918. A board of three

[1] *Congressional Government,* pp. 332–333.

members was provided for, with power to fix wages for women and children, and stipulating fine and imprisonment for anyone paying less than the fixed wage.

A number of women were employed by a children's hospital at satisfactory wages. A woman was employed by a hotel company as elevator operator. She received $35 a month, and two meals a day. This was less than the minimum wage fixed by the board. The hotel company, not willing to pay more, and risking fine and imprisonment in case of her retention, intended to discharge her. She sought to enjoin her discharge, claiming that the minimum wage act would deprive her of her employment and wages without due process of law.

The Court held that the fifth amendment guaranteed to the individual the liberty to contract about one's own affairs, and that the minimum wage law interfered with this liberty. While recognizing that the right to contract was not absolute, and was subject to limitations, no circumstances existed in this case to justify limitation of the liberty.

III. Congressional Claims to Supremacy.

It is not surprising that the action of the Federal judiciary, and especially of the Supreme Court of the United States, should meet with the occasional opposition of Congress. Moreover, prominent leaders of the Congress, advocates of what they deem to be "popular government," have at times asserted the supremacy of Congress over the Supreme Court, and have definitely assigned to that tribunal an inferior position in our constitutional system. The provisions of the Constitution committing to Congress the authority to regulate the appellate jurisdiction, personnel, compensation, confirmation, and impeachment of the membership of the Supreme Court are generally cited in support of this proposition. On the other hand, the Constitution has expressly defined the extent of the judicial power of the United States. It has established the Supreme Court, defined its original jurisdiction, and prescribed the mode of appointing judges of the court. Life tenure is prescribed, subject to "good behavior."

It is clear that the nature of the authority given by the Constitution to the Congress as regards the Supreme Court is that of making adequate provision for the court as the need arises. It was in no sense intended to be a regulatory function which

would permit interference with the court in the performance of its constitutional duties. The authority given has to do essentially with the problem of personnel. The usual practice in most countries is to vest this necessary but not fundamental authority in the legislature. Congress could, if so minded, stop the entire machinery of government by refusing to vote the necessary appropriations. It has never done so. The practice of using such authority as a bargaining or controlling process should be limited exclusively to the political branches of the government. Its use for this purpose is open to question. The practice of Congress in attaching "riders" to necessary appropriation bills has impaired seriously the good effect of the executive's qualified veto. Only the President and the Senate can make a treaty. Often treaties call for the expenditure of public funds. Appropriation bills must originate in the House of Representatives, and "no money shall be drawn from the Treasury but in consequence of appropriations made by law." The House of Representatives is thus in a position to tie the hands of the President and the Senate in matters which concern our foreign relations, and also to bargain for a share in the control of a branch of public affairs from which it is expressly excluded by the Constitution. But it has not offended our dignity as a member of the family of nations by doing so. These legislative functions do not imply a power to destroy, to starve, or to impair. All they imply is the duty as well as the right to provide. The Supreme Court of the United States is the creature — not of Congress — but of the Constitution of the United States.

It is sometimes urged that the power of removal through impeachment is vested in Congress, and that the interpretation of the term "good behavior" is within the discretion of that body. The power to impeach is not vested in Congress in its legislative or political capacity. It was not without reason that the House of Representatives is constituted a grand jury and the Senate a trial court for purposes of impeachment. It is true that there is not a complete identity between the process of impeachment and that of a judicial trial. But it was the constitutional design that the one should approach the other as closely as possible. Therefore, the act of impeachment by the House of Representatives and the trial by the Senate are analogous respectively to indictment by a grand jury and to trial before a court of justice. Political use of this essentially judicial function has

been attempted at times by the Congress, as has been disclosed in our discussion of the impeachment of Justice Chase.

The leading subjects of controversy between Congress and the Supreme Court, both historical and contemporary, have been fully sketched elsewhere in this volume under their appropriate headings. It will serve no useful purpose to detail them here. They have, in the main, concerned matters which the court, in its judgment, has regarded as not coming within the constitutional sphere of Congress, and which that body has attempted to regulate. At best, the court has made only moderate use of a restraining influence. It has exercised no positive authority.

The relation between Congress and the Supreme Court has been examined critically by Mr. Charles Warren in his book entitled *Congress, the Constitution, and the Supreme Court*. He has shown that the earlier Congresses, while sometimes debating the function of the court, generally conceded its negative power to determine the constitutionality of statutes. It was admitted that where legislative powers are limited, the courts alone can adequately judge of those limitations. Mr. Warren has also sketched in an interesting way what the consequences might conceivably be should Congress become the final arbiter of the extent of its own powers and of the meaning of the Constitution. The picture he paints is a dismal one.

In these discussions, members of Congress rarely advert to the fact that the court has upheld Congress in the exercise of its powers under the Constitution, and in its adoption of the measures necessary to carry them into effect.

IV. Recall of Judges and Judicial Decisions.

The recall is one of the recent devices adopted by some of the state governments to retain and guarantee popular control of government. It is based on the principle that elected officers — agents of the people — should be subject to the constant danger of appraisal with a view to retention or dismissal. The recall first appeared in the Los Angeles city charter in 1903. A form of the recall was provided for against the delegates to the Congress under the Articles of Confederation. It was adopted in Oregon in 1908, in California in 1911, in Arizona, Idaho, Washington, Colorado and Nevada in 1912, in Michigan in 1913, and in Louisiana, North Dakota, and Kansas in 1914. The elective

officers of the political branches of the government are in every case subject to recall.

The application of the recall to the judiciary has aroused much discussion. Idaho, Washington, Michigan, and Louisiana have expressly excepted judges from the operation of the law. The other states extend the process to elective judicial officers. Kansas includes appointed officials as well. Arizona, upon applying for admission to the Union, inserted a section in its constitution providing for the recall of judges. President Taft vetoed the enabling act, laying down in his veto message the doctrine that it is the function of the courts to make valid the action of the government against the majority. In his opinion, the Constitution is the will of the whole people, who are bound by it. After admission to the Union, without the recall provision, Arizona so amended her Constitution as to include it. The guarded use of the recall in the case of judges, and its restriction to a small number of states have rendered discussion of the subject entirely academic.

It was also suggested in a certain quarter that the recall should be applied to judicial decisions instead of to judges. In 1912 the state of Colorado sought to extend the process to court decisions involving constitutional points. Thus, the voters of the state could, by a majority vote, nullify the holding of the state supreme court on questions of constitutional law. This law was declared to be unconstitutional.

The opinion prevails, with most of the states and with most of the people, that the judiciary should have an independent position, and that the judges should be subject to removal only by a court of impeachment provided for by the fundamental law of the state or the nation. Moreover, it should be vested with substantial and independent powers, secure against the arbitrary acts of government, and protected in its enjoyment of them.

V. Proposed Constitutional Amendments.

The desire to set the amending machinery of the Constitution in motion is manifested at every session of Congress. The increased use of the amending process within recent years, and its extension to a variety of subjects, has stimulated a movement to annex to the Constitution many provisions which are in their nature essentially statutory. Some of these proposals get no hearing at all. Others are discussed in committee. Only

an exceptional measure is reported to the House or Senate. Many proposed amendments were presented during the Sixty-eighth Congress. Some reached the committees; most of them remained there after arrival; one passed the Senate; and the Child Labor Amendment passed both Houses and was submitted to the states for their ratification. The so-called "equal rights amendment," introduced by Senator Curtis and Mr. Anthony, seeks to establish equal rights for men and women throughout the United States. An amendment which would end presidential, vice-presidential, and congressional terms in January, and which would change the annual session of Congress to begin January fourth, passed the Senate in 1924. The "uniform divorce and marriage amendment," introduced by Senator Capper and Mr. Fairfield, provides for the federal regulation, on a basis of uniformity, of marriage and divorce and cognate questions. Another proposed amendment would prevent the issuance of tax-exempt securities. These proposals indicated the range of subjects to which their proponents would extend the amending clause.

VI. Suggested Changes in the Amending Process.

Of the several attempts to classify the Constitution of the United States, each is based, in the last analysis, on the character of the instrument as a Fundamental Law, and on its inclusion of a number of principles designed to have a certain permanent application. Chief Justice Marshall adverted to its written character, which defines and limits the legislative powers. "Certainly all those who have framed written constitutions," declared the Chief Justice, "contemplated them as forming the fundamental and paramount law of the nation. . . ." The distinction between written and unwritten constitutions, therefore, is in the main one between instruments the provisions of which are of temporary or of permanent application.

Lord Bryce, certainly a friendly commentator on American political institutions, attempts a further classification, and divides constitutions according to their flexible or rigid character. In spite of the historic controversy over a liberal or literal interpretation of the American Constitution, the characteristic of rigidity has ever been attached to it, and has grown out of the conservatism of our amending process. The British Constitution, which can be changed by an ordinary act of the Parliament, has uniformly been regarded as a flexible one.

A third classification has found favor among the jurists of the present day. Constitutions are now divided into the classes which enjoy the protection and guardianship of the judiciary, and those which depend on the legislature for interpretation and enforcement. Our Constitution is clearly of the former group, and in the words of Chief Justice Marshall, " the theory of every such government must be, that an act of the legislature, repugnant to the Constitution, is void." Certainly it is intended to be an instrument of superior application.

Whether the American Constitution be classified as written, rigid, or as in the hands of the judiciary for protection and enforcement, each category bears witness to the same basic features of fundamental law and permanency. The Constitution is not one thing between friends and something else between strangers. Its admiration abroad springs mainly from its fundamental character and its restraining influence. Woodrow Wilson observed: " It is a noteworthy fact that the admiration for our institutions which has during the past few years grown to large proportions among the publicists abroad is almost all of it directed to the restraints we have effected upon the action of government. . . ." Such a view of the Constitution is designed to restrain arbitrary legislative action, to protect the rights of the minority, and to guard the rights of property. To this end there was set up a Bill of Rights, an assembly representative of the people, an executive subject to the laws, and an independent judiciary.

In spite of the foregoing considerations, some people advocate alterations in the amending process which will render the Constitution more easily and readily amendable than is now the case under the fifth article. It is urged that years must pass before the amending power will act upon a proposal which has become in effect a national issue. Moreover, where changes are proposed which affect one of the agencies of government charged with the power of amendment, it is difficult to accomplish even the submission of the amendment to the states for ratification. The seventeenth amendment is cited in proof of this contention.

It has been pointed out that states as units in the federal system, rather than population, have most to do with the business of amending the Constitution. It is possible for thirteen states to withhold consent from any proposed change in the Constitution. It has been indicated that thirteen states, rightly

distributed, with one-tenth of the population of the country, can prevent nine-tenths of the people and all the remaining states from making desired changes.

It is urged by other leaders and interests, on the other hand, that a combination of three-fourths of the states may force undesirable amendments on one-half the population of the country inhabiting the larger states. It is further contended that the recent amendments to the Constitution have introduced provisions which are foreign to the nature of the instrument and to the intent of the framers, which are essentially legislative in character, and which invade the powers reserved to the states. The National Prohibition cases, discussed under another heading, settled that any amendment might be made other than to clauses which are expressly excepted by the Constitution itself.

The claim is made that a small number of men participate in the amending process when accomplished through the state and national legislatures. Lobbies and organizations with money and paid workers can threaten legislators with political extinction unless the amendment is initiated and ratified. Then, members of the legislatures are elected mainly for other purposes. The use of the convention system, both in proposal and ratification, would, in the opinion of some writers, remove these objections.

Senator Wadsworth of New York has introduced an interesting amendment to the amendment article. He would retain the two constitutional methods of proposing amendments, but for purposes of ratification, he would allow the states to select either the constitutional method of ratification by three-fourths of the states in conventions called for that purpose, or a new method of ratifying by the direct vote of the people of the states. He would thus eliminate ratification by three-fourths of the state legislatures.

As President Nicholas Murray Butler has said, the Constitution is readily amendable whenever a large body of opinion, widely distributed throughout the country, genuinely desires its amendment.

VII. Five-to-Four Decisions.

The Supreme Court has held unconstitutional Acts of Congress by five-to-four decisions in the following cases:

A. Ex parte Garland (4 Wallace 333). On January 24, 1865, Congress prohibited all persons from practicing before

the federal courts without taking a specified oath. Garland had been a member of the Confederate congress. He was pardoned by the President and admitted to practice before the Supreme Court. The act was held to be *ex post facto* and an interference with the power of the President to pardon.

B. Pollock v. *Farmers' Loan and Trust Company* (157 U. S. 429; 158 U. S. 601). The Act of August 27, 1894, laid taxes on rents or income derived from real estate, or from the interest on municipal bonds. The court held that a tax on the income from real estate was a direct tax within the meaning of the Constitution, and that a tax on municipal bonds was a tax on the power of the state to borrow money. Moreover, a tax on income from personal property was a direct tax. The statute being unconstitutional in these particulars, was unconstitutional in all its parts.

C. Fairbanks v. *United States* (181 U. S. 283). This involved the act of June 13, 1898. A stamp tax on foreign bills of lading was held to be in effect a duty on exports.

D. Employers' Liability Cases (207 U. S. 463). Under the act of June 11, 1906, interstate carriers were made liable to employees for injuries due to negligence and insufficient construction. The court held that the act covered cases occurring within the limits of a single state over which Congress had no jurisdiction under the commerce clause.

E. Hammer v. *Dagenhart* (247 U. S. 251). The act of September 1, 1916, excluded from interstate commerce articles made in establishments employing child labor. It was held that the statute amounted to a regulation of hours for labor solely within the authority of the state and beyond the scope of the commerce clause.

F. Eisner v. *Macomber* (252 U. S. 189). An Act of September 8, 1916, defined the word "dividends" subject to the income tax as including any distribution to shareholders out of the earnings or profits accrued, whether in cash or in stock of the corporation. The court held that accumulations of profits in this manner, in the form of stock dividends, were not real dividends but a capital interest, and therefore was not a tax on incomes.

G. Knickerbocker Ice Co. v. *Stewart* (253 U. S. 149). On October 6, 1917, Congress decreed that in all civil cases of admiralty and maritime jurisdiction there should be saved to claimants the rights and remedies under the workmen's com-

pensation law of any state. This was held to be an unwarranted delegation to the states of legislative power of Congress under Article I, Section 8, Clause 18, and Article III, Section 2 of the Constitution.

H. Newberry v. *United States* (256 U. S. 232). The Corrupt Practices Act of June 25, 1910, limited the amount of money any candidate for the Senate or House could give, expend, use, promise, cause to be given, or contributed in gaining his nomination or election. The Court held that Congress can regulate only the manner of holding the election. This does not include the selection of a candidate who will later stand for election.

I. Adkins v. *Children's Hospital* (261 U. S. 525). By Act of September 19, 1918, a minimum wage act was passed for the District of Columbia. A board was set up with power to fix wages for women and children, and punishment was provided for those charging less than the fixed wage. It was held that the law interfered with the liberty to contract guaranteed by the fifth amendment.

A proposal has recently been made in the Senate that a law be passed by Congress forbidding the Supreme Court further to hold an act of Congress unconstitutional by a majority, or a five to four vote. It is urged that at least seven of the nine justices should agree to a decision which has this effect.[2] Proponents of this measure believe that it will cut down the number of laws held invalid, and continue in effect laws which a bare majority of the court would annul. It is contended that a dissenting opinion often becomes the basis for a subsequent reversal and majority opinion. Moreover, a decision in an important case by a majority of one does not carry sufficient conviction as to its soundness to cause the people to accept it as final. The requirement of seven votes, rather than five, it is argued, would increase the confidence of the people in the court.

On the other hand, it is urged that the Supreme Court is a tribunal composed of men selected for their ability and distinction. With only nine members, it is not necessary to require a vote larger than a majority on questions of first importance as is the case in the more numerous legislative bodies. An opinion by a judge of the Supreme Court is very different from a vote on a bill, treaty, or confirmation of appointment.

[2] This has been proposed by Senator Borah.

In 135 years of functioning under the Constitution, only nine acts of Congress have been held unconstitutional by five to four decisions. An examination of these cases discloses that the Congress has either attempted to invade the powers reserved to the states or people, or guaranteed to the individual, or to do something not authorized by the powers delegated to the Congress under the Constitution. The measure would give the minority practical control of decisions. It would increase the probability of Congress passing laws violating the Constitution. It would, in effect, bring about an admixture of legislative and judicial powers condemned by the Constitutional Convention, and would set up a legislative court. In support of this view, the following statement of the constitutional convention of Massachusetts is quoted:

> In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them — to the end that it may be a government of *laws* and not of *men*.

VIII. The Significance of Unconstitutional Legislation.

Mr. William Marshall Bullitt, formerly Solicitor General of the United States, has made a searching analysis of legislation declared unconstitutional by the Supreme Court.[3] Up to July 1, 1923, the Supreme Court had disposed of 29,310 cases. Seventy-three members had participated in 262 volumes of reports. There are approximately 44,893 acts of Congress and hundreds of thousands of acts of legislatures of the States. Within this period the Supreme Court has declared 48 acts or parts of acts of Congress void in 49 cases, and about 375 state laws void. Of the acts of Congress so invalidated, three occurred in the first 70 years of our history, and 46 in the next 60 years, of which 22 were in the last twenty years.

As to the nature of these acts and decisions, Mr. Bullitt makes the following classification:

A. The Supreme Court's refusal to assume a jurisdiction which Congress attempted to confer upon it, but which was not authorized by the Constitution. There were twelve cases under this heading.

B. Acts of Congress which encroached upon the purely

[3] W. M. Bullitt, "The Supreme Court and Unconstitutional Legislation," *American Bar Association Journal*, June, 1924, pp. 419–425.

internal and domestic affairs of the states. Here there were sixteen cases involving fourteen acts of Congress.

C. Acts of Congress which infringed the fundamental and personal constitutional rights of individual citizens. There are six cases under this heading.

D. Acts of Congress that endeavored to do the very things which the Constitution positively prohibited Congress from doing. This classification embraces seven cases.

E. Recent cases in which Acts of Congress have been held void. There are six of these, involving among other statutes, the Corrupt Practices Act., the Future Trading Act, the Child Labor Laws, and the Minimum Wage Law.

The asserted dangers attending the right of judicial review of the Supreme Court seem to disappear after an examination of the very moderate use the court has made of this power. It has, in the main, refused to give opinions on political questions, and has scrupulously followed the decisions of the political departments on questions in their nature political. Moreover, the court has enforced the limitations of the Constitution. In a number of cases it has refused to exercise a power conferred by Congress because of its unconstitutionality. The Constitution has been its guide. It controls neither the army and navy, nor the finances of the nation, and derives such authority and respect as the people have conferred upon it under their Constitution and laws. Its peculiar province is to interpret the laws and to maintain a balance between the departments and jurisdictions of the government established by the founders. The function of the court in this respect is admirably described by Chief Justice Taft (*Bailey* v. *Drexel Furniture Co.*, 259 U. S. 20, 37):

> It is the high duty and function of this Court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress, dealing with subjects not intrusted to Congress, but left or committed by the supreme law of the land to the control of the states. We cannot avoid the duty, even though it require us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an insidious feature, because it leads citizens and legislators of good purpose to promote it, without thought of the serious breach it will make in the ark of our covenant, or the harm which will come from breaking down recognized standards. In the maintenance of local self-government on the one hand, and the national power, on the other, our country has been able to endure and prosper for near a century and a half.

IX. Shall We Change Our Form of Government?

It has been definitely proposed in certain quarters that the American system of government no longer functions properly, and that fundamental changes should be introduced in the Constitution which would in effect substitute a new form, with certain modifications, for our present system. This involves the relation of the executive and legislative departments. The theory of checks and balances, or the separation of powers was deliberately established as a principle of the American government in order to prevent unwarranted pretensions or usurpations of power by any one department of the government.

The *presidential* system of government, which prevails in the United States, has an executive head elected by the people for a term of years, removable by impeachment, but politically irresponsible to the legislature; a cabinet appointed and dismissible by the president, and responsible to him; and a legislature elected by the people for a term of years and not dissoluble by the President. The *parliamentary* system, which prevails in England and France, has for its organs of government a titular head of state, hereditary or elected for a term of years, who is not responsible to the legislature nor removable by it; a group of ministers selected and dismissible by the representative legislative body and responsible to it; and a legislature of one or two chambers, chosen by the electorate for a term of years and liable to dissolution by the executive head.

It has become a commonplace to point out the delays, obstructions, and irresponsibility of the presidential system, and to give to the parliamentary system a position of superiority. It is true that the union of powers which is presumed to exist under the parliamentary system — a relation between the executive and the legislature so intimate as to amount to union — responsibility and responsiveness may be obtained to a far greater degree than under the American system. During the Great War, however, cabinet government broke down under the strain. The government of the United States, based upon a separation of powers with an independent and a politically irresponsible executive, only had to strengthen the hands of the executive by legislative enactment. The parliamentary governments were in time forced to scrap their parliamentary forms and to advert to the American principle of an executive

who enjoyed a certain independence of the legislature. This was especially the case in England and France.

Following the war, the leading cabinet governments of Europe have taken certain strides in the direction of limiting the parliamentary domination which has so effectively interfered with the programs of prime ministers and cabinets. Ministerial crises, unstable and irresponsible parties, ministries having responsibility without authority — all these features of the parliamentary system have caused European statesmen to look with favor on the American system. Moreover, the new constitutions of Europe have adopted certain features of the presidential system. Party disorganization and legislative irresponsibility exist in most parliamentary governments. Under the presidential system one is assured of continuity of policy and stability of government.

The possible deadlock between the executive and the legislature under the Constitution is prevented by the extra-legal growth known as the political party. While acting separately and independently, there is coöperation and understanding between the departments as to the policies to be carried out and the laws to be enacted. Occasionally the executive and the legislative majority may represent different political parties. This does result in inaction and delay. Necessary measures are always enacted, however, and a policy of legislative inaction is not always an undesirable thing. In this country, while government is carried on through political parties, yet they are more in the background than in other countries. And to the people and the world it appears to be the government of the United States, rather than the government of a certain political party.

Dr. William Macdonald, in his recent book, "A New Constitution for a New America," has discussed the check and balance system as it obtains in the United States, and recommends its scrapping, together with the adoption of the essential features of the parliamentary scheme. While certain features of the American system are open to criticism, the American people will be slow to exchange an orderly system based on law and a logical separation of powers for a plan under which the executive and the courts must yield to the whims and caprices of a domineering parliamentary majority.

Opinions as to the wisdom of the principle of the separation of powers, and of its effectiveness under the American

system vary. It is not unlikely, however, that the views of those who know something of its working through years of experience furnish a better guide than do the opinions of those who, from an academic standpoint, give to prevailing European systems a position of supremacy. It is modestly submitted that if a better system for the American government exists, the framers of the Constitution or the leaders in government during the century and a half of our country's growth would have found it. Mr. Champ Clark, veteran Congressman from Missouri, and former Speaker of the House, has made this interesting comment on the relation of the departments of government: [4]

> The Constitutional Convention was composed of the wisest men that ever met under one roof. The most sensible thing done by the Fathers of this Republic was the distribution of the powers of the Federal government into three departments; the legislative, the executive, and the judicial.
>
> The fact that a bill must be passed by the House, and also by the Senate, before it is sent to the President for his signature, gives time for reflection, discussion, and analysis, not only by Representatives and Senators, but by the public, for in this age of electricity, nearly everybody betwixt the two seas knows of any event of considerable importance the same day, or not later than the morning after.
>
> The next wisest thing was to divide Congress into two branches. Some lady asked George Washington at a great dinner what the Senate was created for, and why there were two legislative branches, instead of only one. He said that the Senate could perform the same function for legislation that a saucer did for tea; that they would pour the hot tea of the House into the saucer of the Senate to cool off.
>
> Evidently, while George Washington was both a great soldier and a great statesman, he was not up to date in pink tea etiquette or he would not have said anything about pouring tea into a saucer. I have sometimes thought that, in these latter days, it is the hot Senate tea that needs cooling off quite as often as the House tea.
>
> In a few matters the legislative and executive powers overlap and coalesce.
>
> For instance, no bill becomes a law unless it is signed by the President, or unless it is passed over his veto by a majority of two-thirds, of both the Senate and the House; or by the failure of the President to sign a bill within ten days (Sundays barred) after the bill is presented to him, while the Congress is in session, under which circumstances, it becomes a law.
>
> No nomination for office, sent by the President to the Senate,

[4] Clark, *My Quarter Century of American Politics*, Vol. I, pp. 188–189.

becomes effective unless confirmed by it. The President negotiates treaties with foreign Powers, but they are of no avail unless ratified by the Senate.

In one instance, the legislative and judicial functions mingle. This is when the President is impeached by the House and is on trial in the Senate. The Chief Justice of the Supreme Court presides, for the manifest and sufficient reason that the Vice-President, who is to be the beneficiary of the conviction of the President, should not be permitted to preside.

Of course, in such case the Chief Justice cannot vote as to the guilt or innocence of the accused. He simply presides, passing on the admission of evidence, etc. As a matter of fact, the whole impeachment proceeding is quasi-judicial, the House sitting as a grand jury, and the Senate afterward sitting as a petit jury, though it is called the High Court of Impeachment.

However, many friends of the main principles of the American government and of efficiency in legislation and administration would welcome the adoption of measures, short of extended Constitutional revision, which would bring about better understanding and working relations between the executive and the legislative branches. The two propositions are not altogether incompatible. Clearly, such measures must be in keeping with Constitutional arrangements. The essential feature of parliamentary government is forbidden the American government unless we are prepared for drastic constitutional change, for the Constitution provides that "no Person holding any Office under the United States shall be a Member of either House during his continuance in Office." In other words, high executive positions cannot be held by the responsible leaders in the Congress.

The most advanced steps in this direction were taken by President Woodrow Wilson. In 1885, Mr. Wilson published his first book, "Congressional Government." It was a searching inquiry into the American constitutional system, and into our legislative and administrative machinery. The striking contrast in modern politics, he declared, was between congressional and parliamentary governments. He declared: "Congressional government is committee government; Parliamentary government is government by a responsible cabinet ministry. These are the two principal types which present themselves for the instruction of the modern student of the practical in politics; administration by semi-independent executive agents who obey the dictation of a legislature to which they are not responsible, and administration by executive

agents who are the accredited leaders and accountable servants of a legislature virtually supreme in all things." [5] The Congress is thus given a position of primacy in government. To remedy the defects pointed out by Mr. Wilson would require strengthening the position of the legislature by making the executive responsible to it, and removable at its will.

Today, however, the striking contrast in politics is not between congressional and parliamentary governments, as Mr. Wilson then correctly declared, but between presidential and parliamentary governments. In the United States, the Congress has been forced to yield to the President in public esteem. Moreover, there has been a growth of executive power at the expense of the legislature in governments generally. This is due in part to the increased administrative services of the state, which from their nature, must be performed by the executive departments. In this country, no one is more responsible for the change than Mr. Wilson himself, who, together with Mr. Roosevelt, revived the Jacksonian conception of the Presidency. To Mr. Roosevelt, the Presidency was limited only by what was expressly prohibited by the Constitution and laws. He was not satisfied with the exercise of merely positive grants of power. Under his interpretation of the Presidency he could do anything not forbidden by the Constitution and laws, whether specifically authorized or not. Early in his administration, Mr. Wilson revived the custom of delivering messages to the Congress in person. Moreover, he declared that he was not only the head of the government, due to the generous suffrages of the American people, but he was also the leader of the Democratic and the then dominant party, as a result of its deliberate choice. He assumed the leadership, both in legislation and administration, which resulted in a functioning of the executive and legislative departments seldom attained even by parliamentary governments. Mr. Bryan, then Secretary of State, appeared at certain hearings on treaties conducted by the Committee on Foreign Relations of the Senate, with the thought that he might, through his knowledge of negotiations, facilitate ratification. That the Senate resented this as an executive interference does not establish its inadvisability. Mr. Newton D. Baker was summoned to appear before a congressional committee to explain why more progress had not been made in prosecuting the war.

[5] *Congressional Government*, p. vi.

The incident had its political significance, but Mr. Baker, having the facts in his possession, turned the occasion from that of interpellation to one of justification and explanation of the course of the administration.

It is to be observed that Mr. Wilson brought about a more intimate relation between the executive and legislative departments — not by making the executive responsible to and dismissible by the legislature — but by strengthening the power and the independence of the executive. The President, receiving a popular mandate from the people, possessing a definite tenure and an amplitude of powers, and unhampered by counsel of coördinate or superior authority, is in a stronger position than the Congress to determine policy. The Presidency has become a great democratic force in the country. He can, by carefully and wisely utilizing his powers as head of the state and leader of his party, cope with almost any situation. His efficiency varies as does the strength of and his control of his party. The greatest dangers to the American government flow — not from the comparatively few instances where the President and the Congress have represented different party allegiances — but from the condition where both departments, under the control of a single party, fail to get together. This is a fault common to both presidential and parliamentary governments. It goes rather to the efficiency of the party system than to the nature of the government. There will always be conflicts between the legislative and executive departments, and giving the control of the executive to the legislature has not served to avoid them. Nowhere have legislatures distinguished themselves for happy and cooperative relations between the upper and lower branches. Each house, seeking to maintain its own integrity, desires to dominate the other. This deep-seated desire for power, so evident in the relations of the two houses with each other, would characterize the legislature as a whole if it could dominate the executive. Moreover, the one positive, unifying force in the government would be destroyed.

Mr. Chester H. Rowell, a distinguished California publicist, has made some rather caustic criticisms of the American system of governments, state and federal. He has described our federal and state governments as "irresponsible," and he regards this as "one of its imperfections." Our "elections by calendar" are given special attention. Canadian elections, he

observed, are precipitated by an issue, and American elections by the calendar. "And that," he declared, "makes all the difference between elections that are about something, and elections that are about nothing; between real parties and pretended parties; between responsible and irresponsible government. In the campaign orator's favorite climax, 'When the sun goes down on the evening of the first Tuesday after the first Monday of next November, the American people will have decided'—well, they may have decided that the sun shall rise the following morning on Wednesday. Ordinarily, not much else has been submitted to them. The election is called by the calendar, and little is involved in it except the calendar."[6] As evidence of irresponsibility, he cites the reciprocity issue under Taft, the Spanish War and the Philippine question under McKinley, and the issue of peace and war under Wilson. It should be noted that Canadian opposition to the reciprocity agreement did not spring from President Taft's advocacy of it, but from the unguarded statement of a leader in legislation (Mr. Champ Clark) that the United States would eventually annex Canada. Moreover, the reciprocity issue furnishes an excellent example of coöperation between a Republican President, who negotiated the treaty, and friendly Democratic senators, who in the main effected its ratification.[7] It illustrates, also, how a parliamentary minority, ever seeking to regain power, can turn a simple and relatively unimportant foreign issue into one which, the minority claims, threatens the integrity of the country. In the United States, reciprocity was the issue, and it was settled on that basis. In Canada, the issue became the integrity of the Dominion. That an administration may turn its interest from domestic to foreign questions because of an international war, and that issues arise which did not exist at the time the government was constituted, does not establish that as a general rule there should be a popular referendum on such questions. Peace is the normal, and war the abnormal condition of mankind and of nations. Indeed, the European states having parliamentary governments entered the greatest of wars under ministries entrusted with power because of issues unconnected with the questions of peace and war. The government in power was

[6] *University of California Chronicle*, July, 1920, p. 222.

[7] It is a commonplace that President Taft's chief opposition came from within the ranks of his own party.

given its opportunity, and stood or fell upon the fact of whether or not it was successfully prosecuting the war. When changes were made, they were in the direction of dropping certain cumbersome parliamentary arrangements for effective presidential features, rather than giving continued effect to the principle of ministerial responsibility. The government of England, under Lloyd George, furnishes abundant evidence for these statements.

While the "defects" of the American system indicated by Mr. Rowell deserve serious thought, they cannot be remedied without basic alterations in our constitutional system. We have already seen that the central feature of the parliamentary system — executive membership in the legislature — is forbidden under the Constitution. To remedy them would be to forego certain advantages which Mr. Rowell has seemingly not discussed. The functioning of the American government during war under its ordinary powers is unparalleled in history. What was accomplished in parliamentary governments by deep-seated changes was done here through ordinary legislation. Under a parliamentary system, the independence of the executive would be lost. The advantages of this principle are obvious to the American people, who now, more than ever, look to the President for leadership. Finally, under a different system, we would have an executive chosen by the legislature rather than one chosen by the people. It is, in effect, responsibility to the people through a great national political party rather than responsibility to the legislature through the party majority in the lower house.

Certain measures, therefore, designed to bring the executive and the legislature closer together, may well be taken, which are within constitutional limitations. In a later article, Mr. Rowell has taken a more optimistic view of the situation, and has proposed a certain kind of responsibility for Cabinet officers without decreeing their resignation.[8] A real responsibility would result, he has declared, "if they were responsible to the President and to each other for presenting a common policy openly, before Congress and in the sight of the people, by argument rather than by lobbying, and take the conse-

[8] *The World's Work,* December 1924, pp. 155–163, and articles by Mr. Rowell appearing in later issues. See also the answer to Mr. Rowell's argument by William C. Redfield, formerly Congressman from Pennsylvania, and Secretary of the Interior during the Wilson administrations, appearing in the same magazine.

quences of their own prestige of their successes and failures."

This is no new proposal. Mr. Taft recommended, while President, that members of the Cabinet be given the right to appear in Congress, answer questions, and defend their policies. It has also been suggested that the President should choose his Cabinet from men who have had long and wide legislative experience. The position of Mr. Charles E. Hughes, certainly a champion of the Constitution and of the American form of government, is disclosed by the following statement:

> There is, however, the possibility of improvement without weakening our safeguards, by improving the methods of contact between the executive and the Congress. It ought to be possible for Cabinet officers to take part in the debates in both houses on matters touching their departments and thus to be able to give exact information and to defend themselves against unjust attacks. A vast amount of time is now wasted in the Congress over the things that are not and never were. An ounce of fact is worth many pounds of talk. Under the present arrangements, a Cabinet officer often hears of misunderstandings and of an out-pouring of mistaken notions, which a brief statement from him could have corrected, but the misapprehension has been voiced and has gone through the country, perhaps never to be overtaken. Mr. Justice Story in his *Commentaries on the Constitution* says on this point:
>
> "The heads of the departments are, in fact, thus precluded from proposing or vindicating their own measures in the face of the nation in the course of debate, and are compelled to submit them to other men, who are either imperfectly acquainted with the measures or are indifferent to their success or failure. Thus that open and public responsibility for measures which properly belong to the executive in all governments, and especially in a republican government, as its greatest security and strength, is completely done away. The executive is compelled to resort to secret and unseen influences, to private interviews and private arrangements to accomplish his own appropriate purposes, instead of proposing and sustaining his own duties and measures by a bold and manly appeal to the nation in the face of its representatives."
>
> We can preserve the advantages of stability and enhance the opportunities of executive leadership, not by overriding the cherished prerogatives of the Congress, or by attempting to gain an illicit advantage for that leadership, but by having a recognized contact through the regular admission of Cabinet officers to the floor of both houses of the Congress. This would not require any voting power on their part or any change in the Constitution, but simply a change in procedure which could readily be effected by each house. I commend to your attention the report to the Senate on this subject which was made in 1881 by a committee of which Senator Pendleton was Chairman, and Senators W. B. Allison, D. W.

Voorhees, James G. Blaine, and John J. Ingalls, with others, were members. They said:

"The power of both houses of Congress, either separately or jointly, to admit persons not members to their floors, with the privilege of addressing them, cannot be questioned. . . . The provision of the Constitution that 'no person holding any Office under the United States shall be a Member of either House during his continuance in Office' is in no wise violated. The head of a department, reporting in person and orally, or participating in debate, becomes no more a member of either House than does the chaplain, or the contestant or his counsel, or the delegate. He has no official term; he is neither elected nor appointed to either house; he has no participation in the power of impeachment, either in the institution or trial; he has no privilege from arrest; he has no power to vote.

"We are dealing with no new question. In the earlier history of the government the communications were made by the President to Congress orally, and in the presence of both or either of the houses. Instances are not wanting — nay, they are numerous — where the President of the United States, accompanied by one or more of his Cabinet, attended the sessions of the Senate and House of Representatives in their separate sessions and laid before them papers which had been required and information which had been asked for.

"Your committee is not unmindful of the maxim that in a constitutional government the great powers are divided into legislative, executive and judicial, and that they should be conferred upon distinct departments. These departments should be defined and maintained, and it is a sufficiently accurate expression to say that they should be independent of each other. But this independence in no just or practical sense means an entire separation, either in their organization or their functions — isolation, either in the scope or the exercise of their powers. Such independence or isolation would produce either conflict or paralysis, either inevitable collision or inaction, and either the one or the other would be in derogation of the efficiency of the government. . . .

"It has been objected that the effect of this introduction of the heads of departments upon the floor would be largely to increase the influence of the executive on legislation. Your committee does not share this apprehension. The information given to Congress would doubtless be more pertinent and exact; the recommendations would, perhaps, be presented with greater effect, but on the other hand, the members of Congress would also be put on the alert to see that the influence is in proportion only to the value of the information and the suggestions; and the public would be enabled to determine whether the influence is exerted by prevision or by argument. . . .

"This system will require the selection of the strongest men to be heads of departments, and will require them to be well equipped with the knowledge of their offices. It will also require the strongest men to be leaders of Congress and participate in debate. It will

bring these strong men in contact, perhaps into conflict, to advance the public weal, and thus stimulate their abilities and their efforts, and will thus assuredly result to the good of the country."

This desirable change could be made at any time under appropriate rules which would promote the convenience both of Cabinet officers and the houses of Congress. It could be required that questions to be addressed to the members of the Cabinet should be filed a certain length of time before the appearance of the officer and, except when matters relating to his department were under discussion, his attendance would be excused. It would not be difficult to arrange the mechanism of such contact if its importance were recognized.

X. What is the Constitution of the United States?

It is clear that the word "Constitution" cannot be limited to the provisions of the written document. According to Professor Dicey, the great British authority on constitutional law, this subject includes the fundamental rules which directly and indirectly affect the distribution and exercise of sovereign power. One might justly conclude, then, that there are two constitutions: the *Written Constitution,* as it came from the hands of the framers and has been added to by amendment, which may be called the *Formal Constitution;* and the *Unwritten Constitution,* based upon political usage and built up out of judicial decisions. The growth of parties and the increased power and prestige of the Presidential office are evidences of it. This may be described as the *Vital Constitution.*

Some writers contend that the Constitution is not what it seems. Due to what he calls the "custom of the Constitution," Professor Charles A. Beard has indicated the following ways "in which party practices transform the written law": [9]

1. The Constitution states that the President is elected by electors chosen as the legislatures of the states see fit. In fact, candidates are chosen at national party conventions; electors are figureheads selected by the parties and bound to obey party commands; and the voters have the right to choose from the candidates nominated. Even the Cabinet is a body unknown to the Constitution.

2. The Constitution declares that senators are elected by the "people" of the states. To understand how they are elected, one must examine the direct nomination laws and party practices of the different states.

3. The Constitution says that the Speaker is chosen by the

[9] Beard, *American Government and Politics* (4th ed.), p. 97.

House of Representatives, when he is really chosen by a caucus of the majority members of the House.

4. Under the Constitution, the Speaker is presumed to be an impartial presiding officer, but in practice he is one of the leaders of the majority party of the house.

5. The Constitution stipulates that revenue bills must originate in the House of Representatives. In practice, the Senate may be said to have coördinate authority in revenue bills.

6. The Constitution says very little about legislative procedure. The spirit and operation of Congress depend upon the rules, organization of committees, and agreements among the leaders of the majority party.

It is further contended that the Constitution is what the judges make it. Some hold that it is their (the judges') purpose to give effect to the desires of the people. Others regard them as virtual machines, holding their positions to pronounce upon questions which come before them according to some fixed and infallible standard. This proves that the function of the judiciary, especially in its relation to the Constitution, should be made clear to the people. It cannot be denied that the opinion of the judiciary as to its own function has much to do with Constitutional interpretation and application. The common law has been taken as a guide, but it must constantly be supplemented by statute and by equitable remedies. The law of nature has been quoted, but is less precise and definite than the common law in its modern application. The *Federalist* has been taken as a guide, but its theory of government was strongly resisted by the Jeffersonian democracy, and by the Supreme Court itself after the death of John Marshall. Webster's *Dictionary* and Hutchinson's *History of Massachusetts* have been used in decisions as aids to interpretation. The courts have also referred to the sense in which a term was used in the first Congress as a guide to interpretation. Acts of Congress have been given weight in discovering the meaning of the Constitution. The debates in the Constitutional Convention and the actual intent of the framers have formed the basis of many constitutional interpretations. While some guides to its meaning have been used more than others, no one guide has been used to the exclusion of others. The Courts, therefore, have used what in their opinion were the most reliable means of expounding the Constitution. Nothing more can be asked. According to Chief Justice Marshall in the case

of *Marbury* v. *Madison* (1 Cranch, 137), "It is emphatically the province and the duty of the judicial department to say what the law is." Moreover, it is important to distinguish between the effect which is given to the provisions of the Constitution by the courts, and the aids or guides which are used to reach a decision. With respect to the Constitution as a guide for the Courts, the Chief Justice said:

> From these, and many other selections which might be made, it it apparent that the framers of the Constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature. Why, otherwise, does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support! The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as ———, according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States." Why does a judge swear to discharge his duties agreeably to the Constitution of the United States, if that Constitution forms no rule for his government — if it is closed upon him, and cannot be inspected by him? If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

Certain theories of government and law have been held to dictate the interpretation and effect of the Constitution. Such phrases as "the theory of our government," "the essential nature of all free governments," and "the spirit of the Constitution" illustrate the hold which such theories as they connote have on judges and constitutional writers. An "economic theory" of the Constitution has been advanced by Professor Beard, and fully discussed in his book, "The Economic Interpretation of the Constitution." Under the Sherman Anti-trust Act, every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade among the several states or with foreign nations, was declared illegal. In interpreting the Sherman Act, the Court, after ordering the dissolution of the American Tobacco Company and the Standard Oil Company in 1911, declared that the mere existence of a combination did not make it illegal under the Sher-

man law; that the dissolution of a company would not be ordered merely because it restrained trade; and that dissolutions would be ordered only in case of "unreasonable" restraint of trade. The phrase "rule of reason" was coined by Chief Justice White in the Standard Oil case, and as a theory of law was used to restrict the power of Congress to prohibit interstate commerce to constitutional limitations which were judicially enforceable. An examination of the cases decided by the Supreme Court under Marshall and Taney will prove that theories of government and law, entertained by a majority of the Court under the leadership of the actual and titular heads of the Court, have had great weight in the effect given to constitutional provisions. What weight should be given to previous opinions of courts? To what extent should theories of government prevail? Succeeding courts have often reversed the position of previous ones on great constitutional questions. Moreover, mere theories must in time give way to what is constitutionally possible. The Constitution was not designed to give effect to one or several theories. Its purpose was to make the coöperative life of the nation easier, more efficient and more effective. It must, in effect, be a reconciliation of the economic, social, and political interests of the people who made it and who live under it. On this point, Judge Holmes, in his dissenting opinion in the case of *Lochner* v. *New York* (198 U. S. 45) significantly stated:

> But a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

It is idle to contend that the Constitution is a static thing. It is dynamic, and the means is provided for expansion or contraction as the public need requires. "To erect a state, to institute the form of its government, is a function inherent in the sovereign people." The power to make implies the power to change, within the limits and through the machinery determined upon by the power to make. The courts have agreed that the Constitution may be changed in any way with the exception of the provisos appearing in the instrument. It

would be strange, indeed, if the people — living for almost a century and a half under a written instrument, did not amend it. It would be strange if they did not, as the years pass, give effect to some of its provisions through extra-constitutional means not intended by the framers. The Constitution is by no means a definite thing. On this point Judge Cooley has truthfully declared:

> We may think that we have the Constitution all before us; but for practical purposes, the Constitution is that which the government in its several departments and the people in the performance of their duties as citizens recognize and respect as such; and nothing else is. . . . Cervantes says: "Every one is the son of his own works." This is more emphatically true of an instrument of government than it can possibly be of a natural person. What it takes to itself, though at first unwarrantable, helps to make it over into a new instrument of government, and it represents at last the acts done under it.

However, amendments to the Constitution, and what has been called the "custom of the Constitution," do not operate to upset the fundamental principles of the Constitution, or to dictate the writing of a new instrument based upon an entirely different set of principles. Just as certain extra-constitutional practices have become established through custom, so have the first principles and the main features of the written Constitution found a definite and lasting place in our national life. Most of the writers who suggest radical changes, magnify the few practices which vary from the original Constitutional design and minify the importance of the many Constitutional provisions which are definitely woven into our national fabric. It should be remembered that a few concrete cases do not suffice to establish a general principle of widespread application. Professor Beard, easily the first of the scholars who stress "the changing spirit of the Constitution," or look upon the instrument as essentially "a changing organism," has answered this view himself by laying down the following "general principles of the federal system":

1. The doctrine of limited government.
2. The doctrine of delegated powers and the supremacy of federal law.
3. The protection of private rights.
4. The separation of powers.
5. The doctrine of judicial supremacy.

6. The regulation of relations between states.

7. The definition and guarantee of such political rights as citizenship and suffrage.

These general principles, so ably framed by Professor Beard, while subject to modification by constitutional interpretation and political practice, have in the main remained as they were conceived at the time of the "Founding Fathers." No substantial effort has been made to change them by amendment. They have been strengthened through the passing of time. They have found expression in the written provisions of the Constitution, and are exemplified in the practice of the national and state governments, and in the civic behavior of our citizens. To eradicate them would be to destroy the instrument which gave them birth. They must prevail if the Constitution is to endure.

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Notes on *Myers* v. *United States.* A recent decision of the Supreme Court of the United States (Myers v. United States, 272 U. S. 52) has confirmed the President's power of removal. Under this decision the legislature may not by statute interfere with the dismissal by the President of anyone appointed by him to the executive departments. Myers had been appointed postmaster of the first class at Portland, Oregon, by President Wilson, for a term of four years, with the Senate's advice and consent. The statute covering this case reads: "Postmasters of the first, second, and third classes shall be appointed and may be removed by the President, by and with the advice and consent of the Senate, and shall hold their offices for four years unless removed or suspended according to law." President Wilson removed Mr. Myers from office without the Senate's consent. Myers attempted to recover his salary from the date of his dismissal. The majority of the court upheld the exclusive right of the President to remove independently of the Senate. It was contended: (1) that the power of removal was essentially an executive function which would have been limited by the framers of the Constitution had they so intended; (2) that the constitutional power to appoint carried with it the incidental power to remove, and the required consent of the Senate in certain appointments could not be extended to cover removals; (3) that the right of the legislature to vest the appointment of inferior officers in the courts or heads of the departments as well as in the President affected the power of removal only as such appointments were denied to the President; and (4) that the constitutional mandate of the President that he shall execute the laws made necessary his control of subordinates in the administrative circles. The opinion of the court was given by Chief Justice Taft. Three associate justices dissented. Mr. Justice Holmes asserted that since the office owed its existence to Congress that body might stipulate a life term free from interference as well as it could abolish the office. Mr. Justice Brandeis held that the Congress under its constitutional right to provide for the appointment of inferior officers could fix the term of tenure. Mr. Justice McReynolds observed that since the government is one of limited and enumerated powers, "nothing short of language clearly beyond serious disputation should be held to clothe the President with authority wholly beyond Congressional control, arbitrarily to dismiss every officer whom he appoints except a few judges." This significant decision supports definitely the increasing authority of the President. It is indeed in keeping with the extra-legal tendencies of enlarged executive power. When pushed to an extreme it might lead to the demoralization of our civil service and of the merit system. The Congress could, should it choose to do so, vest the power of appointment in the heads of departments, and could limit the right of the President to remove.

PART III

THE SPIRIT OF THE AMERICAN CONSTITUTION

CHAPTER XXXVII

FUNDAMENTAL LEGAL RIGHTS

The Constitution of the United States is an instrument of government rather than a bill of rights. The work of the founders was to organize and perfect a then faulty and inefficient government — not to justify or to fight a revolution. Nevertheless, many people thought that so fundamental an instrument should contain some definite enumeration and guarantee of the rights which had led to the establishment of the new government. The state constitutions had led the way. The federal constitution was expected at least to go as far. Jefferson, writing from Paris, expressed the hope that four states might delay ratification until a bill of rights had been added, which should provide for "freedom of religion, freedom of the press, freedom of commerce against monopolies, trial by jury in all cases, no suspensions of habeas corpus, no standing armies." This was in keeping with his political philosophy, that the government was less important than the rights it was designed to secure. The leading opponent of the incorporation of these ideals into the Constitution was Alexander Hamilton. In the *Federalist* he declared that the preamble to the Constitution was to be preferred to these political "aphorisms," which belonged to a treatise of ethics rather than in a constitution of government. The Constitution itself was a sufficient bill of rights, and anything further would be both unnecessary and dangerous, as they provided exceptions to power not granted. "For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?" The proponent of these rights was James Madison, who introduced the amendments in Congress in 1789. The argument of Hamilton that the Constitution was in itself a limitation was agreed to, but Madison contended that the discretionary power of Congress should be limited to the extent of preserving fundamental rights, and especially

so when it was expressly authorized to pass all laws necessary and proper to carry into effect the powers vested in the government of the United States. The remedy for abuses of unlimited means to enforce and exercise express and exclusive powers lay in the express exceptions of fundamental rights. Moreover, the adoption of these amendments would secure friends for the cause of union, and for the instrument. The desire for these amendments was found in the state ratifying conventions. Twelve amendments were submitted to the states for ratification on September 25, 1789. Two failed of ratification, but the remaining ten were ratified by all states except Connecticut, Georgia, and Massachusetts. Virginia ratified last, on December 15, 1791. These amendments are popularly known as the American Bill of Rights.

I. Freedom of religion and worship.

Congress can make no law respecting the establishment of religion, nor can it prohibit the freedom of religious worship. In the United States, all have the right, unlimited and free, to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which is in keeping with the laws of morality and property, and which does not infringe personal rights. No man, therefore, can, in the name of religion or through religious ceremony, violate the laws of the land. The Supreme Court has held that polygamy and all other open offenses against the enlightened sentiment of mankind may be prohibited, notwithstanding the pretense of religious convention by which they may be advocated and practiced. One man, charged with polygamy, claimed that he had married the second time, having a first living wife, under the influence of a religious belief that it was right. The Supreme Court declared that the guarantee of religious freedom did not absolve one from responsibility under the criminal statutes. Nor did religious freedom extend to the case of one who pretends to believe in supernatural powers in order to secure money and to use the mails in pursuance of such a purpose. During the Great War, ministers of religion and theological students were exempted from the draft, and members of religious organizations whose doctrines denied to them the moral right to engage in war were excused from combatant service. These laws were held to be in keeping with the first amendment. Religious belief, therefore, does not absolve one

of his duties to aid in the defence of the state, although the Congress may in its discretion exempt some classes wholly and others in part. Positive protection of the people in their religious liberties is left to the states. The constitutional provision is only a limitation on the Congress.

II. Freedom of speech and of the press.

Congress is forbidden to abridge the freedom of speech or of the press. This does not permit the publication of libels, blasphemous or other indecent articles, or other publications injurious to morals or private reputation. Moreover, this amendment does not prevent the operation of a law making it an offense to mail an obscene paper. While the first amendment prohibits legislation against free speech as such, it was not intended to grant immunity for every possible use of language. The creation of boards of censors for motion-picture films has been held constitutional. The Espionage Act of June 15, 1917, was held to be not a violation of the right of freedom of speech or of the press.

In spite of this amendment, the Congress has at times successfully censored the press, and has silenced political critics through fine and imprisonment. The Sedition Act of 1798 was passed during the administration of John Adams. It purported to punish those inciting unlawful combinations against the government, or anyone writing, uttering or publishing any false, scandalous and malicious writing against the government, either house of Congress, or the President, with the intent to defame the government, or to bring one or all parts of the government into contempt or disrepute. Many were fined and imprisoned under this act for legitimate criticism of the government. Later, those imprisoned were pardoned and their fines returned. During the Civil War many people were arrested for criticising the government and its war policy. These acts, together with certain other measures, were justified by President Lincoln in the following language:

> I did understand, however, that my oath to preserve the Constitution to the best of my ability, imposed on me the duty of preserving by every indispensable means, that government — that nation of which that Constitution was the organic law. Was it possible to lose the nation and yet preserve the Constitution? By general law, life and limb must be protected; yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb.

I felt that measures, otherwise unconstitutional, might become lawful by becoming indispensable to the preservation of the Constitution through the preservation of the nation. Right or wrong, I assumed this ground and now avow it. I could not feel that, to the best of my ability, I had even tried to preserve the Constitution, if, to preserve slavery, or any minor matter, I should permit the wreck of government, country, and Constitution altogether.

By the Espionage Act of 1917 and the Sedition Act of 1918, persons saying or printing anything hindering the operations or success of the American armies, or printing, writing, or publishing any disloyal, profane, scurrilous, or abusive language about the American form of government or Constitution, or any language designed to bring the form of government, the Constitution, the armed forces, the flag, or the military uniform of the United States into contempt, scorn, contumely, or disrepute, were heavily fined and imprisoned. Professor Chafee of the Harvard Law School has discussed this legislation and the cases arising under it in his penetrating volume, *Freedom of Speech*. Many of the convictions were for statements of publications which would generally be regarded as ordinary criticism, well within the rights of the citizen. Thus, the criticism of the policy of conscription, of the financial measures of the government, of the declaration of war without popular consent or approval, of the war as a class war, and of war as an unchristian practice, were regarded as hindering the prosecution of the war, or as abusive of the form of government, the Constitution, the combatant population, the flag, or the uniform. After the war came to an end, many were pardoned. The same degree of freedom is not allowed in time of war, when combatants are fighting, and are answerable to courts-martial, as in time of peace. The explanation is found in the statement of President Lincoln: "Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of the wily agitator who induces him to desert?"

III. The right of assembly and of petition.

Nor can the Congress pass any law abridging the right of the people peaceably to assemble, and to petition the government for a redress of grievances. The same restriction has generally been imposed on the state legislatures. Thus the people have the right to assemble peaceably at any time and

place, to discuss their problems, and to draw up a petition asking the government for relief. This is one of the most common and most useful of rights. There is no guarantee that the petition of grievances will be acted upon. The right is merely protected against federal law. The positive guarantee of the right rests with the states.

The right of assembly is connected with the right to petition the government for a redress of grievances, but it is not limited to the object of petition. Assemblages for other purposes, social, religious, political, and commercial, are protected in the same manner, unless the exercise of the right is not in keeping with the public peace, security, or welfare. It may be limited so as to prevent its exercise from promoting unlawful purposes or from causing public inconvenience.

The right of petition is historic, and was won through persistent effort on the part of aggrieved petitioners. The need of this right is probably less apparent under a representative form of government. It may be used as a lawful occasion for the people to assemble. The subject matter of the petition, if kept within the limits of the privilege, cannot be made the basis for a prosecution for public or private libel. The right of petition has been exercised in such a manner as to violate the Espionage and Sedition Acts. Petitions for the repeal of such acts, and against military measures during war have been so decided. The classic case presented by Mr. Chafee is that of some farmers of South Dakota, who petitioned officers of the state for a military arrangement less onerous than the draft, a referendum on war, the payment of war expenses from taxation, and other alleged abuses. These farmers were given prison sentences. The referendum on war was a doctrine which Mr. Bryan preached even up to the time of the declaration of war. The right of petition, therefore, must, especially during war, be limited to requests for things which are not prohibited under the laws.

IV. The right to bear arms; immunity from the quartering of soldiers.

Under the second amendment, it is declared: "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." The right is recognized that the states should have their militia, which are organizations of soldiery to maintain

order and to defend the state. The dread of standing armies caused the makers of the Constitution to place their greatest confidence in well-organized militia. It is regarded as distinctly a state rather than a federal institution. The federal government may call upon the militia of the states only "to execute the laws of the Union, to suppress insurrections, and to repel invasions." These are all domestic, and not foreign services. By the National Defence Act of 1916, the President may make the militia regiments units in the army of the United States, in case the use of armed forces greater than that of the regular army has been authorized by the Congress. The question of the militia, then, is not of the right to bear arms, but of state or federal control. The right to bear arms may extend to the keeping and carrying of weapons for necessary self-defense, or for the home. It is no violation of this amendment to prevent the carrying of concealed weapons. Most states do this. Police officers, sheriffs, and other officers of the peace are excepted. Others may be excepted upon application and proof of sufficient cause. The privilege is given to those having large sums of money to carry, as express messengers, certain postal employees, and bank messengers. In some cities, money is transported from one bank to another in armored cars, equipped with repeating guns, and manned by expert gunmen.

The third amendment provides that "No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law." One of the grievances found in the protest literature of the Revolution, and especially in the Declaration of Independence, was the quartering of large bodies of armed troops in the colonies. This is also one of the fundamental abuses complained of by the British, in their papers addressed to their sovereign. The accommodation of soldiers during peace is made to depend on the consent of the owner, and in time of war on the law. The control of the military policy of the United States by the civil authorities is in keeping with the spirit of this amendment. There is no disposition on the part of the people to deny to those who fight for the defence of the country their just rights. The armed forces exist, however, to preserve and not to impair or destroy the civil rights of the citizen.

V. Immunity from unreasonable searches and seizures.

The people are guaranteed against the violation by Congress of their right to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. The question of what constitutes an unreasonable search or seizure is a judicial and not a legislative question, but in determining it all circumstances of the seizure must be taken into account. The compulsory production of private papers to be used as evidence against the owner is regarded as an unreasonable search and seizure. An Act of Congress of June 22, 1874 (18 Stat. 186), authorized the court, in civil proceedings under the revenue laws, to require the production of private papers, and in case of refusal to do so upon the demand, permitted the government to assume as true its allegations as to the contents of the books and papers. The act was held to be repugnant to the fourth amendment forbidding unreasonable searches and seizures. This immunity, if enforced, restricts the practice of those charged with the enforcement of criminal laws to secure conviction through unlawful seizures, and enforced confessions obtained through the invasion of the rights of the accused. Papers which are taken from the person of a defendant in a criminal case may be admitted in evidence, and is not an unreasonable search and seizure. However, books and papers found and seized in the office of the accused after his arrest without legal authority and without a warrant, is an unreasonable search and seizure. Only an examination of the decided cases can reveal just what may be called reasonable or unreasonable searches and seizures. Each case must be examined on its own merits by the courts. The constitutional guaranty, however, has in the main protected the citizens in their persons, domicils, papers, and effects.

It is also provided that no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. It has been held that a warrant of commitment by justices of the peace must state a good cause certain, supported by oath. An act of Congress provided that " all suspicious persons " could be arrested and prosecuted as criminals in the District of Columbia. The court held that a suspicious character does not constitute crime, nor may the

government regard one having such reputation as a criminal. "Probable cause" must therefore be shown.

The search warrant is a protection both to the citizen and to the government. It is the persistent practice of criminals to cover the evidence of their guilt. The rights of citizens must of course be protected, but the wrongdoers must also be brought to justice. A negative guarantee of immunity must not operate to jeopardize or destroy the greater security to society of the apprehension and punishment of criminals. It is essential to capture criminals, and to search persons or houses on occasion. Before such a search can be made, a court must issue warrants, commanding a peace officer to seize a certain person or to search certain houses or places for the discovery of evidence of wrongdoing. Someone must appear and declare under oath that reasonable grounds exist for the belief that the search and seizure will result in the finding of evidence. The place must be described, and also the things or persons to be seized. A warrant issued by any court without these requisites is a violation of the constitutional guaranty, and evidence secured under it is altogether inadmissible.

VI. Indictment by a grand jury.

The fifth amendment reads in part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger." A grand jury, composed of twelve but not more than twenty-three, is assembled every session of court. They are usually chosen by lot. They sit apart and hear evidence of alleged offenses brought to their attention by the prosecuting officers. They may investigate, but may not find a man guilty or not guilty. It is their function to decide whether the evidence submitted to them is sufficient to justify the trial of the accused. If so, a "true bill" is voted; and if not, "no bill" is voted. Witnesses are heard, but not cross-examined. The defendant does not appear at all, nor is he represented in any way. The investigation is conducted in secret, and is purely for the government in determining whether criminal process shall be instituted.

Of all the constitutional guaranties, that of indictment by

a grand jury is subject to the most abuses, and has yielded the least returns. The grand jury may proceed independently of the prosecutor, and may return indictments against his recommendation. But it is generally the instrument of the public prosecutor, and registers and approves his suspicions rather than its own. It ordinarily does not have the desire, the opportunity, and often not even the ability to investigate cases properly. The other side is not presented, and is usually not considered. The feeling prevails that the prosecutor has a better knowledge of these things than the jury, and it brings in indictments or not as the prosecuting attorney recommends. Consequently, the grand jury does not perform the function intended for it, and often its findings are of little or no value. The better practice would probably be to permit prosecuting attorneys to proceed on their own initiative, and hence assume a direct responsibility for their prosecutions. The grand jury has in a number of cases become a political weapon in the hands of unscrupulous law officers, or of the interests which control them. Such abuses have a cover of legality when indictments are returned, and the accused, no matter how just his cause, must submit to trial. If the case reveals such a conspiracy, the prosecuting officers may point to the grand jury's indictment as a justification of their procedure. Often cases damaging to reputation and character are commenced, with intent to convict if possible, but dropped at the convenience of the district attorney. The original intent of the grand jury was to prevent the waste of time and money in the trial of cases where the evidence seemed insufficient to convict. Its performance of this function today is hotly disputed. Certainly prosecutors would be more reluctant to perpetuate these abuses without the protecting judgment of a grand jury. The net result is that the indictment more often than not raises a suspicion of guilt which from the first operates as a handicap upon the accused.

Some states have abolished the grand jury, while others allow suit to be brought on information without grand jury indictment. It was charged that grand jury indictment was a necessary part of the "due process of law" provision of the Constitution of the United States. It was decided that it was not an essential part of due process of law, and that the states might if they choose, abolish the grand jury. The constitutional guarantee operates against the Congress alone.

VII. Double jeopardy.

No person shall be "subject for the same offence to be twice put in jeopardy of life or limb." Trial and acquittal of an accused person in a federal court means that the door is closed so far as answering to society for that offence is concerned. In case of acquittal, the state has no right to appeal, although the right is usually allowed the accused if convicted. Even the discovery of new evidence does not operate to reopen the case. An acquittal anywhere within the jurisdiction of the United States (even in the Philippine Islands, which are designated by the Supreme Court as "Unincorporated territory") is a good defence against a second trial. This is not the case where an offense is committed which is indictable both in a state and in the United States, and an acquittal in one court does not prevent trial in another. An acquittal by a court having no jurisdiction, is no acquittal at all. Sometimes juries are discharged by the court for various reasons, and the accused have regarded this as a bar to further trial. The Supreme Court has held that courts may discharge juries from giving verdicts when there seems to be a manifest necessity for the act, or when the ends of justice would otherwise be defeated, and order a trial by another jury. The defendant is not put twice in jeopardy.

VIII. Self-incrimination.

According to the fifth amendment, no one "shall be compelled in any criminal case to be a witness against himself." In the early days torture was a common means of compelling the admission of guilt of a crime. Even in colonial days, men were tortured in order to compel them to give evidence against themselves. When torture was not used, men were threatened through examination and cross-examination, in the effort to secure admissions which would aid in the proof of guilt. It is now the business of the government to prove the guilt of persons charged with crimes. Such proof must consist of the sworn testimony of witnesses of facts and circumstances independent of admissions made by the defendant. He cannot be compelled to be a witness in any case, but he may at will be a witness for himself. The accused is also protected against inducements or threats made outside of court to secure a statement as to his guilt. Alleged confessions are often not admitted in evidence. If the confession is involun-

tary, and induced by promises or threats, it is clearly inadmissible. A person may at his discretion waive this constitutional guaranty. His statement must be made at his own volition, and without any promises, intimidations, or persuasion. Then and then only is the statement admitted against him. The Supreme Court has declared that "It is impossible that the meaning of the constitutional provision can only be that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself. It would doubtless cover such cases, but it is not limited to them. The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed the crime." A statute provided that no evidence obtained from a witness by means of a judicial proceeding should be used against him in any criminal proceedings. This was something of an inducement to encourage testimony. It was held that the witness could refuse to answer certain questions, and that the law violated the fifth amendment, because it did not afford the witness absolute immunity against future prosecution for the offence to which the question related.

IX. Due process of law.

Under the fifth amendment, no one can be "deprived of life, liberty, or property, without due process of law." A like limitation is imposed on the states by the fourteenth amendment, with the exception that it is accompanied with a prohibition of the denial of the "equal protection of the laws." The term "due process of law" springs from article 39 of Magna Charta, which prescribes that a freeman may be punished only by "the lawful judgment of his peers, or by the law of the land." The phrase is not so susceptible of such precise definition as it would seem. The Supreme Court in one case held that due process of law within the meaning of the fifth amendment referred to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed and interpreted according to the principles of the common law. It was also declared that due process of law implies such legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement

of private rights. Again, the Supreme Court at one time gave its approval to the definition given by Daniel Webster in his argument before the Court in the Dartmouth College case:

> By the law of the land (which he identified with due process of law) is most clearly intended the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society.

It is clear that the original meaning of the term is to be found in the Magna Charta concept. Blackstone said that " It protected every individual of the nation in the free enjoyment of his life, his liberty and his property, unless declared to be forfeited by the judgment of his peers or the law of the land." Professor Haines has taken the view that this interpretation is incorrect, and that the value of the provision has been exaggerated in the history of English liberty. " It was intended," said Professor Haines, " primarily to lay down some rules of procedure in the administration of criminal justice, namely, that judgment must precede execution, that a judgment must be delivered by the accused man's ' equals ' and, that no free man could be punished except in accordance with the law of England, *per legem terrae*." The law of the land provision was extended to include indictment by a grand jury and the making of arrests by warrant, but was designed only as a limitation on the Crown in the administration of justice. The term had at the end of the eighteenth century in England, according to Professor Haines, two accepted meanings, — one a method of procedure in criminal trials, and a procedure following the customary law or one legalized by act of parliament. It was not generally understood to be a limitation on the powers of parliament.

The real meaning of " due process of law " depends upon the various situations to which the principle is applied. The Supreme Court of the United States decided that one Hurtado had not been deprived of life and liberty without due process of law when arrested and tried for murder by a petit jury without preliminary grand jury hearing and indictment, under a California statute which allowed this procedure. It has been held that trial by jury in civil suits in the state courts is not guaranteed by the fourteenth amendment. It does not necessarily carry the right of appeal from the decision of adminis-

trative officers to a court, or from a lower court to a higher court. In levying taxes, general notice to owners and the right to protest certain kinds of taxes are generally the only limitations imposed by the "due process" clause. The term does not necessarily imply a regular proceeding in a court of justice, or after the manner of such courts. In case of a charge of an infamous crime, due process of law requires arraignment and plea. In impaneling a jury, "all rules of practice must necessarily be adapted to secure the rights of the accused," in the absence of a statute covering the subject. Military law, as applied to those in the military or naval service of the United States, is due process of law. Only by an examination of the actual cases is it possible to understand the real import of this most variable of legal terms.

After the adoption of the fourteenth amendment, the interpretation of the "due process" clause entered upon a somewhat distinct phase. Under the fifth amendment, it was not used as a limitation upon the general legislative power, nor was it looked to as the protector of personal and property rights. The term was introduced in a number of the state constitutions in one form or another. The makers of these constitutions had in mind procedural limitations rather than restrictions on the substantive powers of legislatures. The principle of judicial review had been invoked by the courts against the Congress and the state legislatures, but only in special cases, and for express constitutional violations. The idea of legislative supremacy prevailed generally, and they were permitted to do anything not expressly forbidden to them by the federal or state constitutions. The application of the fourteenth amendment changed this. The original design of the amendment was to place all the local government legislative bodies subject to review by the federal courts as regards the protection of persons and property. A wording to this effect was changed somewhat to secure votes for its submission. Dr. Horace E. Flack, in *The Adoption of the Fourteenth Amendment,* declared that the amendment had three purposes: (1) to make the Bill of Rights (the first eight amendments) binding upon, or applicable to the states; (2) to give validity to the Civil Rights bill; and (3) to declare who were citizens of the United States.

The first attempts to cover personal and property rights with the folds of the due process clause of the fourteenth

amendment, as against the action of state legislatures, met defeat at the hands of the Supreme Court. It was pointed out that the Civil War amendments (thirteenth, fourteenth, and fifteenth) were designed to protect the negroes, and not to place the protection of persons and property altogether in the keeping of the federal government. Justice Miller observed that the fifth amendment had been a part of the Constitution for nearly a century, and had during a stormy controversial period rarely been invoked as a special limitation on powers of government. He declared further (in 1877): "But while it has been a part of the Constitution as a restraint upon the powers of the states, only a very few years, the docket of this court is crowded with cases in which we are asked to hold that state courts and state legislatures have deprived their own citizens of life, liberty, or property, without due process of law." In time, however, the view of the Supreme Court changed, until the opinion prevailed that most local legislation could be reviewed by the federal courts in so far as it invaded the security of personal and property rights. The right to contract was soon regarded as a "liberty," which state laws could not impair. According to Justice McReynolds, "it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." This interpretation would encompass all of man's affairs and activities within one special kind of liberty of which men may not be deprived by the states without due process. The opposite view was expressed by President Roosevelt, who declared that the liberty of contract was "Often a merely academic 'liberty,' the exercise of which is the negation of real liberty."

The transition in the Supreme Court doctrine was soon made, and the term came to imply the prevention of arbitrary legislative and administrative acts, and the invasion of the fundamental rights of citizens. Thus the control of a vast field of legislative and administrative action, originally intended for the states, has been placed ultimately in the hands of the federal courts.

X. Property rights and eminent domain.

This subject has been fully discussed under another heading.[1]

XI. Criminal trials by jury.

In all criminal prosecutions, the accused is protected in the enjoyment of certain rights. The sixth amendment has been held to relate "to the prosecution of an accused person which is technically criminal in its nature." In addition to the right of trial by jury, several privileges are guaranteed. The accused must be afforded an open and speedy trial. These provisions are designed to prevent secret proceedings, and to prevent undue confinement pending a trial which might result in acquittal. Even today, many virtually serve their terms waiting for trial, while others are jailed for offences which they did not commit. The trial must take place in the State and district where the crime is committed. This was intended as a remedy for the abuse which the Declaration of Independence describes as follows: "He (the British king) has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his assent to their acts of pretended legislation . . . for depriving us in many cases, of the benefits of trial by jury . . . for transporting us beyond the seas to be tried for pretended offenses." Moreover, the district where the trial is held must have been previously ascertained by law.

The accused must be informed of the nature and cause of the accusation. This is substantially a reaffirmation of the principles of the common law, but the Congress and the courts are forbidden to abrogate them. It means that the statutes fixing and declaring offences must not be construed so as to embrace offences which are not within their intention and terms. Not all elements of the crime need be stated, but it must be plainly declared by the legislative power. The grand jury indictment constitutes a sort of notice, which enables the accused to prepare for his defence.

The accused is entitled to be confronted with the witnesses against him. This means absolutely and on all occasions, not merely if they can be produced and if they be within the jurisdiction. Depositions cannot be used by the government in criminal cases. The witnesses must appear in court be-

[1] *Infra,* Chapter XXXVIII, Section VIII.

fore the accused, testify orally, and be subjected to cross examination by the defendant. The accused, however. may take the depositions of witnesses in his own behalf, which are read to the jury.

The accused is also entitled to have compulsory process for obtaining witnesses in his favor. By order of the court, a subpoena is served upon witnesses by some authorized person, as the sheriff. It commands them to appear in court, and to be examined before the court and the jury as to what they know about the guilt or innocence of the accused. Under such orders, the officers must serve the subpoenas, and the state must pay the fees and traveling expenses of the witnesses.

It is also provided that the accused shall have the assistance of counsel for his defence. The right to employ and be represented by counsel is the important guarantee. This provision is designed to secure a fair defence at the same time the accused is being prosecuted vigorously. The right to use counsel, then, is absolutely necessary to our concept of justice. The rich man has something of an opportunity to meet with success our rather one-sided machinery of justice, where the prosecution is generally seeking a conviction, as a result of its natural tendency to pre-judge. It often happens that the man of moderate means must invest his savings of a life-time in a defence fund, in an attempt to clear his name and to secure his liberty. He is often left penniless. The plight of the originally penniless defendant is worse. He is allowed to plead his own case if he so desires, but this is virtually a meaningless privilege against the resources of the state. The court may appoint counsel to represent the penniless defendant. There is no guarantee except the conscience of the counsel that the work will be well done, and it usually falls to inexperienced men. Moreover, the motive of assigned counsel in seeking this type of work is often not above suspicion. There is a steady demand for the employment of a public defender who would represent those defendants not able to finance their own defence. Since the question of adequate defence has become one of finance as well as the justice of the case, it seems that this is the only way in which the practical inequalities of our machinery of justice can be reduced.

The most important guarantee of the sixth amendment is trial by an impartial jury. This right is fundamental, and is

protected by the state and federal constitutions. The petit jury is essentially an institution of English law. Its early history is somewhat obscure. It has three distinct sources: (1) the general custom of the Teutonic peoples to refer questions in dispute to the body of the people; (2) the custom, growing out of the first, of appointing a definite number of men (usually twelve or a multiple of twelve) believed to have special knowledge of the matter in dispute to decide on behalf of the rest, and (3) the inquests or recognitions of the Norman period, by which a body of men, usually twelve, were chosen to examine the facts of the matter in controversy. The jury system is the result of evolution. The form of its first introduction into America did not last, and the constitutional guarantee of trial by jury brought nothing new into our system of jurisprudence. The state constitutions usually provide that "the right to trial by jury shall remain inviolate." The provisions of the federal constitution bind only the federal and territorial courts. Under the federal and state constitutions, therefore, abolition or serious alteration in the jury system is placed beyond the power of the legislature. The constitutions do not define trial by jury. The courts look to the common law of England rather than to any particular form of its application in any colony or state. The fundamental characteristics of the jury system may not be changed. Everything else may be altered.

What alterations, if made, would violate the constitutional provision and virtually abolish the system? One would be the number of jurors. The number twelve was the usual but not the exclusive number of jurors at first. It has become so much a part of jury practice that to change it would be a violation of the constitutional provision. A few states have amended their constitutions so as to admit juries of less than twelve men. The system would be altered fundamentally should the rule of unanimous concurrence of the jurors in the verdict be changed. This is a requirement peculiar to the Anglo-American legal system. The legislature could not change this feature. It has been done by some states in civil cases through constitutional amendment. While the dissenting twelth juror may hold out against logic and reason, it is better that the rule of unanimity should prevail. A third elemental requirement is the securing of impartiality and competence through the proper selection of jurors. The constitu-

tion of juries should be made with this constantly in mind. Any provision which will allow a biased, prejudiced, or incompetent person to serve on a jury is a violation of the right. Finally, the province of the jury is essential to its preservation. Historically, the primacy of judge or jury as to both law and fact varied according to the degree of confidence placed by the people in the courts. Each should be supreme in its own sphere. By the time of the American Revolution, it was settled in English law that judges must answer to questions of law and juries to questions of fact. Neither should be allowed to invade the province of the other. The number of jurors, the rule of unanimity, the quality of impartiality, and the peculiar province of the jury are therefore its chief elements which are beyond the power of the legislature. They are inherent in the system, are necessary to its preservation, and must remain. The reform of the jury system, in the direction of increased efficiency of administration, within the limits of its essential elements, is entirely within the legislative power.

The Supreme Court, in the case of *Ex parte* Milligan (4 Wall. 122) made the following comment on the institution of trial by jury:

> The great minds of the country have differed on the correct interpretation to be given to various provisions of the Federal Constitution; and judicial decision has been often invoked to settle their true meaning; but until recently no one ever doubted that the right of trial by jury was fortified in the organic law against the power of attack. It is now assailed, but if ideas can be expressed in words, and language has any meaning, this right — one of the most valuable in a free country — is preserved to every one accused of crime who is not attached to the army or navy or militia in actual service.

XII. Civil trials.

The seventh amendment preserves the right of trial by jury in suits at common law where the value in controversy shall exceed twenty dollars. Suits at common law are "limited to rights and remedies peculiarly legal in their nature, and such as it was proper to ascertain in courts of law, and by the appropriate modes and proceedings of courts of law." The term "common law" is used in this connection as distinguished from equity and admiralty and maritime jurisprudence. The right of trial by jury, considered as an absolute

right, does not extend to cases of equity jurisdiction. The right of trial by jury is preserved against infringement by every department of the national government, therefore section 723 of the Revised Statutes prohibits all courts of the United States from sustaining suits in equity where the remedy is complete at law. Unanimity in verdicts is secured by this amendment, and an act of Congress cannot change it. This is also true of the territorial courts. The provision " implies that there shall be a unanimous verdict of twelve jurors in all federal courts where a jury trial is held." Trial by a jury of twelve men before a justice of the peace is not guaranteed. A jury trial is open to either party. Under the laws of Congress, issues of fact in civil cases are tried by the court without the intervention of a jury only when the parties waive their right to a jury by a stipulation in writing. Some of the states allow a verdict by a number less than unanimity. This amendment does not apply to the state courts.

It is also provided that no fact tried by a jury shall be otherwise reëxamined in any court of the United States, than according to the rules of the common law. This forbids the Federal courts to reëxamine facts tried by a jury in any other manner. The modes known to the common law to reëxamine such facts are the granting of a new trial by the court where the issue was tried or to which the record was properly returnable, or the award of a *venire facias de novo,* by an appellate court, for some error of law which intervened in the proceedings. The control of the court over the verdict is a part of trial by jury. The right to have the issues tried by a second jury when the verdict of the first jury is affected by some infirmity for which the common law required the trial court to set the verdict aside, is as much a trial by jury as understood by the Constitution, as the first trial. The effect of the provision is to require a trial by jury as understood at common law, including the examination of facts.

XIII. Punishment for crime.

The eighth amendment declares that " Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The discretion of the magistrate in taking bail in a criminal case is to be guided by the compound consideration of the ability of the prisoner to give bail and the atrocity of the offence. To require larger bail than

the prisoner can give is to require excessive bail, and is to deny bail in a case clearly bailable at law. However, the nature of the offence must also be considered. The design of the provision is that no one shall be deprived of his liberty unless in the interests of justice.

After the verdict of guilty is reached, excessive fines and cruel and unusual punishments are forbidden. It would be difficult to define just what are cruel and unusual punishments under this amendment. The Supreme Court has held that punishments of torture, such as those formerly inflicted for atrocious crimes and for high treason, and all others in the same line of unnecessary cruelty, have been forbidden by this amendment. Barbarous punishments were imposed in civilized countries for very light offenses. Not content with common hanging, the phrase "hanged, drawn and quartered" signified all that was terrible in this form of punishment. Death by electrocution has been declared to be not a cruel punishment. Death by shooting is not a cruel and unusual punishment for murder in the first degree.

Punishment of the guilty is to protect society against a repetition of the crime or abuse, and also to operate as a deterrent against crime by other members of the social order. The degree of punishment varies according to the opinion of the people. The idea of punishment for its own sake is rapidly passing. The death penalty is imposed only in extreme cases. Confinement is regarded as ample protection to society and as a sufficient lesson to the prisoner. The principle of the indeterminate sentence, with a board of parole authorized to shorten the term upon good behavior and substantial proof of intent to reform, is being adopted in many state jurisdictions. A system which returns a man to society in worse condition than when first confined is in the opinion of an increasing number of mankind, a dead loss. The test of course must be capacity for improvement on the part of the prisoner.

XIV. The writ of habeas corpus.

The Constitution placed the following limitation on the powers of the Congress: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." The Habeas Corpus act was passed in 1679, during the reign of Charles II,

in order to facilitate the granting of the ancient writ, *Habeas Corpus ad subjiciendum*, which means "You may have the body brought up before you." The writ was issued in England upon application to a court of justice, when proof was furnished of cause to believe that a prisoner was unjustly detained. It enabled a prisoner to have his case judicially investigated immediately, in order to discover the cause of detention, if any. The judge would grant the writ on the application of the person detained. The persons responsible for the detention must bring the prisoner before some judge, and state the reasons for detention. If the cause appears, he is returned to prison; if not, he is released. In the language of the Supreme Court, "The object of the writ is to determine whether a prisoner can be lawfully detained, to protect against unwarranted encroachments upon personal liberty."

The interests of personal liberty are best served by the application rather than the suspension of this historic writ. It should also be remembered that its application might during crises endanger the life of the state. Chief Justice Marshall, in the course of an opinion, stated that the suspension of the writ was a power to be exercised by the legislature. This position was affirmed by his successor, Chief Justice Taney. In the early days of the Civil War, the President authorized the suspension of this writ on his own authority. The Chief Justice, in a famous opinion, complained that the President delegated its suspension to a military officer who through military power resisted judicial process; that the right to suspend follows an enumeration of legislative powers, and is understood to belong to Congress; that no notice had been given of the President's assumption of this power; and that this condition of things would make every citizen directly dependent for his liberties on the will and pleasure of the commanding officers of a military district. The Department of Justice contended that the President was the sole judge of an emergency requiring the suspension of the writ, and that he was answerable only to the high court of impeachment for such an act. On March 3, 1863, Congress authorized the President, "whenever in his judgment the public safety might require it, to suspend the privilege of the writ in any case arising in any part of the United States." An official proclamation of suspension was issued September 15, 1863.

XV. Attainder and ex post facto laws.

Congress can pass no bill of attainder. The same prohibition is applied to the states. This is a legislative act which inflicts punishment without a judicial trial. The term embraces bills of pains and penalties, and the legislation is none the less objectionable in that it merely confiscates property; it may affect the life of an individual, or confiscate his property, or both. By such a bill, the civil rights and capacities of men convicted of treason, or of a crime for which the death penalty was imposed, were extinguished. The estate, land, or other property of the convicted was forfeited to the state, and nothing could pass to his heirs by inheritance. His blood was "corrupted," and civil rights were denied to his posterity. This limitation on the legislatures of the states and the nation merely restricts the inflicting of a penalty to its proper place — the courts.

The Congress and the state legislatures are also forbidden to pass *ex post facto* laws. This refers to criminal laws which are retroactive and which are disadvantageous to those charged with crime. According to the Supreme Court, *ex post facto* legislation embraces "every law that makes an action done before the passing of the law, and which was innocent when done, criminal and punishes such action; every law that aggravates a crime, or makes it greater than it was when committed; every law that changes the punishment and inflicts a greater punishment than the law annexed to a crime when committed; and every law that alters the legal rules of evidence and requires less or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender."

The force of these provisions is shown in the case of *Ex parte* Garland. The radical Republicans were minded to make the course of reconstruction difficult, both for the states which had been re-admitted to the Union, and for the officers who had served under them. In pursuance of this policy, the Congress passed on January 24, 1865, a bill which prohibited all persons from practicing before the federal courts without taking an oath that the person concerned had never held an office under the Confederacy. Garland had been a member of the Confederate Congress. To take such an oath would have made Garland guilty of perjury. He had been pardoned by the President, and admitted to practice before the Supreme

Court. The Supreme Court held the law to be a bill of attainder, in that it imposed a penalty without a judicial trial, and an *ex post facto* law, in that it prescribed a penalty for an act committed before the enactment of the law. It was also an invasion of the President's absolute right to pardon. The law was therefore held to be unconstitutional. Later Garland became Attorney-General in the Cabinet of President Cleveland, and died while urging the claims of his country before the Supreme Court, from which body the Republican majority would at the time have barred him.

XVI. Treason.

Treason is defined by the Constitution, and the Congress is limited in the prescribing of penalties therefor. The crime is the oldest and the most heinous in history. It was first regarded as the murder of the sovereign. Under its cover many crimes were added, until its abuse became the subject of petition for its amelioration. The Constitution declares that "Treason against the United States, shall consist only in levying war against them, or adhering to their enemies, giving them aid and comfort." Moreover, "No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or in open confession in open court." It is also provided that the loss of civil rights or of property shall not extend beyond the life of the person guilty of treason. "Corruption of blood or forfeiture" apply only during the life of the person attainted. This provision was inserted to protect the children and heirs of the convicted person. Other than these limitations, the power to declare the punishment for treason is exclusively in the Congress.

Probably the most celebrated trial for treason was that of Aaron Burr. The unfortunate man had crossed the path of Alexander Hamilton, who had been the instrument of his political defeat. Burr retaliated by a challenge to a duel, which resulted in Hamilton's death. The Republican party hated him cordially, and the Federalists even more, due to the untimely death of their brilliant leader. Burr resigned the vice-presidency of the United States, and gave himself to a scheme which if successful, would have led to the dismemberment of the southwestern portion of the United States. He had plotted this division before his resignation. In due course, President Jefferson, upon the request of the House of Repre-

sentatives, communicated to the Congress an account of the activities of Burr, and such evidence as he had of Burr's plans. Burr was arrested and sent to Richmond in 1807 for trial on the charge of " (1) High misdemeanor in setting on foot within the United States a military expedition against the dominions of the King of Spain, a foreign prince with whom the United States at the time of the offence were, and still are, at peace. (2) Treason in assembling an armed force with a design to seize the City of New Orleans, to revolutionize the territory attached to it, and to separate the Western from the Eastern states."

It was urged by the defense that there was no evidence of treason, and no overt act or probable ground to believe Burr guilty. Being the most atrocious of crimes, it required the strongest evidence to support it. It was urged that there were no soldiers anywhere to prove an expedition. Unfortunately, the case brought out the bitter feeling between President Jefferson and Chief Justice Marshall. Jefferson permitted Burr to go as far as he thought the public safety could permit, but the Chief Justice, by his rulings, gave the jury the impression that they could not convict, and that no act of treason had been committed. A verdict of not guilty was therefore returned. Marshall cited Jefferson to appear personally on the witness stand, to be questioned by the defence counsel, and probably by Burr himself. To compel the President by subpoena to go into court when lawyers desired him as a witness would have meant the decline of the Presidency in dignity and authority. Jefferson properly refused to appear. Burr's efforts to dismember the Union came to an end, and he in time came to disgrace. The trial involved the personal differences of the President and Chief Justice too much for the good of the country.

XVII. The right to contract.

This right has been discussed to some extent under other headings. States cannot, under the Constitution, pass any law impairing the obligation of contracts. The term " contracts " as used here includes agreements between the states, between states and individuals, states and corporations, and a state and the United States. Corporations as well as individuals enjoy the protection of this clause. It does not extend to social compacts between a state and its citizens. The rights pro-

tected must be other than governmental. Moreover, it protects contracts which relate to property or some object of value which confer rights that may be asserted in a court of justice. Whether the contract be executed or executory, express or implied, relating to real or personal estate, by parol or under seal, its obligation remains unimpaired.

The obligation of the contract may be defined as the law which binds the parties to perform what they have agreed to do. It is the law which is in force at the time the contract was made. It enters into the contract and becomes an essential part of it. The obligation does not inhere and consist in the contract itself, but is the law which applies to the contract. Laws which have to do with the validity, construction, discharge, and enforcement of the contract make up the obligation and become a part of the contract. The elements both of time and place are important in determining the obligation.

The degree of impairment is immaterial. The least, or any impairment at all will invoke the constitutional guaranty. A contract is impaired the obligation of which is so altered as to make the contract more beneficial to one and less advantageous to the other than its terms provide. State constitutions, being the fundamental law of a state, are not contracts within the meaning of this clause. Public corporations, as cities, towns, and counties, are created by the state legislatures, and their charters are not contracts within the import of this provision. They may be altered, annulled or repealed at will unless the state constitution directs otherwise. The charter of a private corporation is a contract between the state and the corporation, the obligation of which cannot be impaired by state law. A state may provide in its constitution that all future charters and contracts may be repealed or amended. This escapes the application of the "obligation of contract" clause. The right of eminent domain remains unaffected by this clause. The obligation of a contract is not impaired when the property affected is appropriated for a public use and compensation is made.

The interpretation by the Supreme Court of the freedom of contract as one of the liberties of which one can not be deprived without due process of law, under the fifth and fourteenth amendments, greatly extended the right of the people to enter into contracts, and invaded the field of social legislation.

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CHAPTER XXXVIII

PRINCIPLES AND IDEALS OF AMERICAN CONSTITUTIONAL GOVERNMENT

The United States has, through political evolution and through the ideas of its leading thinkers on matters of state, developed a set of general principles of government, which have had a fairly logical growth and consistent application. Some of these principles existed in the minds of the Revolutionary statesmen and the "Founding Fathers," while others are entirely the product of experience. These principles include, among others, the federal idea, the doctrine of popular sovereignty, a written constitution, the separation of powers of government, the doctrine of judicial supremacy, and the presidential system of government. These ideas have to some extent been modified by constitutional interpretation and by political practice. Little effort has been made to introduce fundamental alterations in them, and in the main they have been strengthened by the flow of time. Some have found expression in the written provisions of the Constitution, all have been exemplified in the practice of our national and state governments, and also in the civic behavior of our citizens.

I. The federal idea.

The federal idea was not original with the American statesmen of the Revolutionary period. The general view was that the people should rule, and the precise nature of the Union was given scant attention. The proper division of authority between the central and state governments had to await the test of experience.

Under the Articles of Confederation, the Congress consisted of not less than two nor more than seven delegates from each state. Each state was entitled to one vote. States could recall their delegates. No arrangement was made for a permanent executive. A committee of one delegate from each state represented the Congress when the main body was not in session. Only matters of admiralty were covered in the sections on

the judiciary. The power to make treaties and to declare war was given to the Congress. The Articles could not be amended except with the consent of the Congress and by the ratification of the state legislatures. Each state retained its " sovereignty, freedom and independence, and every power, jurisdiction and right " not expressly granted to the United States.

The government did not work under the confederate idea. Difficulties, especially regarding matters of taxation, the national debt, and foreign and domestic commerce arose. Failure to provide for an executive and a judicial system were handicaps from the start. The central government had no power to collect taxes, which led to a disordered fiscal system, and to the inability of the government to pay the public debt. The Congress was powerless to enforce treaties with foreign governments. In fact, the government of the Confederation was forced to rely completely on the governments of the states for the enforcement of its laws. The Congress and the national government could not act directly against the individual either for the collection of taxes or the enforcement of laws. These considerations led to the movement, ultimately successful, toward a " more perfect union."

Probably the outstanding question of the constitutional convention was that of a national or federal system of government. Did the framers plan to leave the states free and independent, or to give the status of sovereignty and independence to the Union? There was clearly a difference between the intent of the framers and of the ratifying authorities. The question was at the time largely one of sovereignty, and whether or not it was located in the state or in the nation. This question did not receive attention by the framers as a theory. They were interested in working out a scheme of government which would deal adequately with questions of defence, taxation, the economic situation, and foreign relations. As it worked out, only a strong government could do this. The voters intended to approve a constitution retaining the sovereignty of the states, and from which the states could withdraw. The Convention intended quite the opposite. To James Madison, it was a mixed system, in that ratification was federal and not national; the House national; the Senate federal; the executive a compound of both; the Constitution in its operation was national and not federal, because it deals with individuals and not states; in the extent of its powers it

was federal and not national, because its powers are enumerated; and the amendment section was a compound.

The question of the nature of the instrument was discussed in the convention, not as a philosophy of government, but as a working arrangement. A resolution was passed providing for a national government. Opposition came from the Connecticut and New York delegations. Luther Martin declared that there were three parties in the Convention: those who wanted to abolish state lines; those truly federal and republican; and those representing the large states, seeking to gain particular powers over the other states. These groups represented respectively the nationalists, the federalists, and those leaning toward imperialism. The first and third groups combined, he declared, and formed a national as opposed to a federal government, " designed not to protect and preserve, but to abolish and annihilate the state governments." He thereupon withdrew from the Convention, and opposed the ratification of the Constitution.

It is to be observed that the term " federal " was applied to the plan offered by the small states which would organize the new government with the state and not the national government as the unit with power. Luther Martin used the term in this sense. What he had in mind was a confederation rather than a federal union. In time the defenders of the constitutional régime were called " Federalists," and its opponents " Anti-Federalists." The position of the Federalists under Hamilton and Marshall was more in the direction of a national rather than a federal government. The student should keep in mind, in spite of the shifting uses of the term and of a steady drift toward a strong national government, that the United States is a federal as contrasted with a unitary state. The fact of a central government exclusively sovereign within its proper sphere is not inconsistent with the federal idea of a banded state whose chief units are autonomous within their defined sphere. The national government of the United States is also a limited government.

The federal arrangement is set forth in the Constitution of the United States. The Congress has power to lay and collect taxes, duties, imposts and excises, to pay the debts and to provide for the common defence and the general welfare of the United States; to regulate commerce with foreign nations; to establish a uniform rule of naturalization; to coin money,

regulate the value thereof, and of foreign coin; to define and punish piracies and felonies committed on the high seas and offenses against the laws of nations; to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; to raise and support armies, and to provide and maintain a navy. Again, it is provided that no state shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money; or, without the consent of Congress, keep troops or ships of war in time of peace, enter into any agreement or compact with another state or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not permit delay. The President is invested with power by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; to nominate and, by and with the consent of the Senate, appoint ambassadors, other public ministers and consuls, and to receive ambassadors and other public ministers. The judicial power of the United States extends to all cases arising under treaties; to all cases affecting ambassadors, other public ministers and consuls; and to all cases of admiralty and maritime jurisdiction. And the Constitution, and the laws made in pursuance thereof, and all treaties made under the authority of the United States, are declared to be the supreme law of the land, and to be binding on the judges in every state, anything in the constitution or laws of any state to the contrary notwithstanding.

II. The doctrine of popular sovereignty.[1]

The conception of the sovereignty of the state began with Aristotle, and was developed still further by the Roman law. It had two aspects: one supreme authority within the state, and the independence of the state of all other members of the international community. Jean Bodin furnished the classic statement and example of both aspects when he declared that

[1] Professor E. S. Corwin has observed: "The conception of the sovereignty of the state did not begin with Aristotle; the problem had not yet been dreamed of." In his *Politics*, III, ch. 7, Aristotle declares: "The words constitution and government have the same meaning, and the government, which is the supreme authority in states, must be in the hands of one, or of a few, or of many. . . . Hence, in a constitutional government the fighting-men have the supreme power, and those who possess arms are the citizens." While the term was formally introduced by Bodin, the idea harks back to Aristotle. If this is not so, a number of distinguished scholars are in error.

the king of France was supreme within his own dominions and was free from all external control. It was, at best, an illustration of internal and external sovereignty based on power. The absolute conception of sovereignty was illustrated in the claim of the king to power by divine right. When this claim was made by both pope and king, the king won, only to transfer the contest to one between ruler and ruled. A suggestion of popular sovereignty was found in the concept of the *lex regia*, under which the power of the Roman people was conferred by them on the king or emperor. The theory took definite form when the people, under the banner of popular sovereignty, began to resist the claims of the kings to absolute sovereignty. When the theory prevailed that rulers governed by agreement or consent of the people, it was argued that such consent, if given by the people, could be freely withdrawn. Rousseau worked out such a theory of popular sovereignty, even to the entire neglect of minority rights.

The doctrines of the social contract and of natural rights were given a special application in England through the influence of the Scotch Presbyterians. This sect held that each congregation should have a covenant, and should regulate its own affairs. In addition to congregational autonomy, the idea prevailed that every member had the right to share in church administration. Independent sects gained control of the government under Cromwell, and their liberal religious principles were extended to affairs of state. This was nothing other than the view that civil government, like church government, is based on the consent of the governed. This theory was carried to America by representatives of the independent sects. The clash of the theocratic and congregational religious elements in the colonies was significant. The demand for religious liberty and equality was coincident with that for political equality, and contributed profoundly to democracy in New England. The celebrated Mayflower Compact, an agreement written and signed, avowing a common purpose, and incorporating under a spirit of concession to and acquiescence in the common good, had much to do with the beginnings and growth of self-government in Plymouth.

At no time was there any doubt among the revolutionary leaders that the new American government should be based on the principle of popular sovereignty. On this basis they justified the Revolution. Men were born free and equal.

Hence, government depended on the consent of the governed, and all legislation must rest upon the consent of those obeying the laws. Taxation without representation was therefore tyranny. Sovereignty clearly resided in the people, although little attention was given at the time to its precise location and method of exercise. Persons entrusted with the government of the people were agents, and responsible to the people. If they did not secure the purposes for which the government was instituted, they should be removed. These ideas were admirably expressed in the Declaration of Independence and in the writings of publicists of the day, notably Thomas Jefferson and Thomas Paine. Moreover, the American constitutions, state and national, drafted by representative conventions chosen for the purpose, and finally ratified by the people, institutionalized into fundamental law the doctrine that the people are sovereign.

During and following the Constitutional Convention a spirit of distrust of the ideals of the Revolution developed. To many members of the convention, democracy meant rule by the masses, unchecked and unrestrained. Majority rule meant to them the rule of the propertied by the propertyless class. In a measure the views of such men prevailed. John Adams, once a champion of revolutionary ideas, declared that while sovereignty came from the people, it ought to be checked and restrained. He saw advantages in a bicameral legislature, one branch popular and the other aristocratic with a powerful executive reconciling conflicts between them. Alexander Hamilton was the leading opponent of the idea of popular sovereignty. His plan for a constitution would provide the form of a democracy without the substance. He favored an executive chosen for life by electors and with an absolute veto, senators chosen for life, governors of states appointed by the national government, and a land qualification for electors.

The chief proponent of popular sovereignty in the United States was Thomas Jefferson. He was a consistent believer in the right of revolution, in equality, in the doctrine of natural rights, and in a government through consent. Indeed, the spilling of blood occasionally through revolutions would in his opinion be a purging thing for the body politic. The masses, in his opinion, should rule, but he recognized that intelligence was a necessary factor in government. He was by nature opposed

to a strong government. After all, Jefferson was a member of the aristocracy. Jackson, a man from the ranks and a popular leader, identified the sovereignty of the people with strong executive leadership, and regarded himself as their agent, acting under their mandate and expressing their will.

Constitutional and legal discussions as to the location and exercise of sovereignty did not have the effect of changing the character of the state power originally determined upon, *i.e.*, the sovereignty of the people. The Constitution begins with the phrase, "We, the people of the United States. . . ." It does not say the Supreme Court, the President, the Congress, the states, but the people. In the transition from a confederation to a federal union, the concept of state sovereignty was scrapped, and that of the people established. The celebrated decision in the case of *Texas* v. *White* describes the three elements of statehood — people, territory, and government. After a searching analysis of our system of government, the court, in discussing the nature of the Union, declared the people to be the important element in the United States, that territory and government existed for the use of the people, and that this consideration established the doctrine of popular sovereignty as the basis of our government.

III. The doctrine of a written constitution.

The people of the United States have prescribed, by means of a written constitution, rules for the exercise of sovereign power. The instrument defines the rights and duties of the government, distributes its powers, prescribes the mode of their exercise, and limits them in behalf of civil and political liberty. It sets up a framework of government; its lays down main principles of fundamental law which are meant to be of general and permanent application. The Constitution, however, does not work through some mystical charm of its own. It is a skeleton which supports living organisms. It gives form and substance to the organism, but the life is elsewhere. Any instrument of law, no matter how fundamental, is cold and lifeless without the contact of human personalities. Ours is a government of laws, but a government by men.

An obvious purpose of the written constitution was to form a more perfect union. The organization of the government, and the definition and distribution of powers between the states

and the nation, and between the departments of government were primary considerations. A written constitution is essential to a government based upon the principle of the separation of powers. Another purpose of a written constitution is the protection of the individual as regards his rights and liberties. Bills of rights are written for this purpose. Fundamental rights are guaranteed, and governmental interference with them is prohibited. Again, a written constitution serves to limit as well as to create the powers of government. The written constitution as an expression and guarantee of limited government is thus described by Chief Justice John Marshall:

> The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written. . . . Certainly all those who have framed written constitutions contemplated them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the Constitution, is void. This theory is essentially attached to a written constitution, and is consequently to be considered by this court, as one of the fundamental principles of our society.

The American idea of a written constitution, embracing the organization, distribution, and limitation of powers of government, a bill of rights, and an amending process, and based on the idea of consent both in the drafting and approval of the instrument, was a departure in government. It represented, for the first time, a deliberate attempt to make into fundamental law the representative democratic ideas of the centuries. They included foreign liberal ideas of government, but many were indigenous. The models of the state constitutions were the colonial charters, which were changed to strip the governor of his former prerogative. These changes, in the main, included the weakening of the executive power, the substitution of an elective body for the old council, and the requirement that the judiciary should be responsible to some popular organ of government. Under the Constitution there is guaranteed a bill of rights for the protection of individual liberty, a representative assembly of the people, an executive subject to the laws, and a judiciary with large and independent powers, which is a safeguard against the acts of government itself.

The idea of a written constitution has found a large place in American business and social life. While each state has its

constitution and each city of consequence has its charter, it is the almost universal practice of voluntary associations, commercial and social, to have their constitutions and by-laws, their articles of incorporation, or the embodiment of their principles, purposes and procedure in some written form. It is merely the converse of the ancient theory that the sovereign should define through codes of law the rights and duties of their subjects in their private relations. The tables are turned, and the people have merely set forth regulations for the observance of governments and kings.

IV. The separation of powers.

The germ of the present-day concept of the separation of powers is found in Aristotle's *Politics*. The modern view was expressed by Montesquieu. Liberty, to be secure, must rest upon the principle of the limitation of powers of government. To Montesquieu, this could best be done by a separation of the legislative, executive, and judicial powers along the lines of the British system. Each organ should have its own powers precisely defined, and there should be a negative inter-relation of departments through a system of checks and balances which would prevent the usurpation or the invasion of other functions. The key to his plan was the separation of the legislative and executive departments, the very antithesis of the plan which now exists in the country whose political institutions he sought to describe. The idea was incorporated in the Declaration of the Rights of Man drawn up by the French revolutionary assembly, but it has found little application in that country.

The principle of the separation of powers fell upon fertile soil in the United States. The state constitutions were amended so as to neutralize the former arbitrary power of the governor. Monarchy was feared, and any successful scheme must be a limitation rather than an expansion of power. The colonial view of government was largely negative, as the people feared what a strong government might do. This conception grew out of the abuses of the Crown under its claim of royal prerogative. Along with popular elections and short terms of office, and other liberalizing tendencies, came the curbing and restriction of the departments of government.

The principle found application in the state constitutions.

The ideal was expressed in the celebrated declaration of the Massachusetts constitutional convention:

"In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them — to the end that it may be a government of *laws* and not of *men*."

Through the Constitution of the United States, the powers of the three departments are expressly defined. The President, in his relations with the legislature, informs that body of the state of the union through his annual and special messages, and, by withholding his signature to bills, may prevent legislation. No legislative or administrative program can succeed, however, without the coöperation of a majority of the legislature, and all departments of government are dependent upon the Congress for their running expenses. The federal judiciary is virtually independent, operating as an arbitrator between the states and the nation, the government and the individual, and the President and Congress. The President must share with the Senate the function of making treaties and appointments, which by practice have become, from the Senate's standpoint, matters of ratification and confirmation respectively.

V. The doctrine of judicial supremacy.[1]

With a government formed of the states and the nation, with powers limited and distributed through a written constitution agreed to by the people, it was inevitable that a system of courts would be developed in order to interpret the instrument. Two principles have controlled in the institution and development of the judiciary. One is the independence of the judicial department, which has been maintained on the whole, in spite of occasional attacks from the legislative and executive de-

[1] Professor Corwin has declared the term "doctrine of judicial supremacy" to be misleading. This is a term used by Professor Haines in his constitutional writings. Any term which seeks to describe Marshall's argument in *Marbury* v. *Madison* is likely to fall short of an accurate description of Marshall's meaning. The same is true of Professor Corwin's own term, "The doctrine of judicial review," which I have also used. Davis's "judicial veto" sheds no further light. McBain's term, "judicial control" is perhaps open to the least objection. Perhaps I should have coined a more apt phrase, but I have preferred not to attempt to add to our growing constitutional jargon.

partments. The other is the right of the Supreme Court to declare void acts of the national legislature which contravene the national Constitution. Comparative independence of the judiciary was secured through the appointment of judges by the President, with the advice and consent of the Senate, to serve during good behavior. The right of judicial review was not so simple a matter.

Enemies of the doctrine of judicial review claim that it is a usurpation of power. The question did not receive marked attention in the Constitutional convention. Professor Beard has pointed out that of the fifty-five delegates attending, twenty-six approved of the idea in one form or another, while only four are on record as opposing it. Alexander Hamilton, writing in the *Federalist,* contended that the Constitution was a fundamental law to be regarded by the judges, that it was their (the judges') province to ascertain its meaning and that of the acts of the legislature, and in case of an irreconcilable variance, to give validity to the one of superior obligation. The courts were, indeed, designed to be an intermediate body between the people and the legislature, in order to keep the legislature within the limits of its authority. To Hamilton, the interpretation of the laws was the peculiar and proper province of the courts.

The doctrine set forth by Hamilton was given practical application by John Marshall as Chief Justice. In the famous case of *Marbury* v. *Madison* (1 Cranch, 137), Marshall declared that the people may in their sovereign capacity, determine their principles of government, which may be an organization and distribution of powers, or may include limits upon those powers. Our government was established as one of limited powers, and to make the limitation effective, the Constitution was written. If an act of the legislature is on a level with the Constitution, then " written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable." It is the business of the judicial department to say what the law is. In case of a conflict between the Constitution and a law, the Court must decide between them. The Constitution is an instrument for the government of courts as well as of the legislature. Judges must under oath prescribed by the legislature discharge their duties agreeably to the Constitution of the United States. The Constitution is first mentioned as the supreme law of the land, and

only laws made in pursuance of it are included in this category. "Thus," he declared, "the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void; and that courts, as well as other departments, are bound by that instrument."

This principle, repeatedly asserted and again denied, has remained the distinguishing characteristic of our judicial system.

VI. Presidential system of government.

This principle is related to that of a written constitution, and to the idea of the separation of powers. While the makers of the Constitution desired to prevent the location of arbitrary authority in the hands of the executive, they also desired an effective executive. Here the Convention had a free hand. Three arrangements led to the three characteristics of a strong executive. The requirement of unity was met by the provision for a single executive. The factor of energy is found in the amplitude of executive powers in the Constitution. The necessity of a definite tenure is found in the four-year term. Political practice has decreed that the President shall be elected directly in fact, but indirectly in theory. This gives him a virtual mandate from the people, who look to the President rather than the legislature for leadership.

These arrangements have made possible an executive of comparative independence, and have contributed to the world of political thought a distinctive type of executive. Instead of the union of powers which prevails under the leading European systems, we have an executive elected by the people for a term of years, who can be impeached, but who is politically irresponsible to the legislature; a cabinet appointed and dismissible by the President and responsible to him; and a legislature elected by the people for a term of years and not dissoluble by the President. Certain critics of the American system point out the possible conflicts between the President and the Congress, resulting in inaction and delay. This hiatus is bridged by the political party. Ministerial crises, unstable and irresponsible parties, ministries having responsibility without authority — abundantly present under parliamentary forms, are lacking under our system. Under the presidential system we are assured of continuity of policy and stability of

government. Such advantages the American people will be slow to forego.

VII. The ideal of majority rule.

Popular sovereignty, according to Lord Bryce, is one of the two leading principles of the American Commonwealth. It means, in a word, that the people rule. An axiom of the same principle, and supplementing it, is that of majority rule. Only in this way can democracy function, and only thus can the people discover and express its will. The people are the source of all political authority, and all power comes from them. What are the people? What tests must be applied to determine what the people want? Popular sovereignty is the end of government. Majority rule is the means to that end.

The first state constitutions were designed to give effect to majority rule. The idea of the "consent of the governed" prevailed, and every effort was made to escape the British and colonial models, with the view that this procedure would avoid the evils of the former system. The executive power of the governor was virtually destroyed. The governor's council became an elective body — the smaller and upper legislative chamber. The legislature, the sovereign and representative body, was given ample powers, and enjoyed the confidence of the people, while the governor was watched for fear of usurpations of power. He was usually the creature of the legislature. Today, the position of the legislature and governor is reversed, so far as public confidence is concerned.

The Constitution represented a reaction against the majority rule of the states. It was designed to be a limitation on the rights of the states, which would destroy them as sovereign bodies. There was a general distrust of the masses and of popular government. Said John Adams: "We may appeal to every page of history we have hitherto turned over for proofs irrefragable that the people, when they have been unchecked, have been as unjust, tyrannical, brutal, barbarous, and cruel as any king or senate possessed of uncontrollable power: the majority has eternally and without one exception usurped over the rights of the minority." To the class of opponents of majority rule belonged Alexander Hamilton. In arguing for a strong and stable government, he declared: "All communities divide themselves into the few and the many. The first are the rich and well-born, the other the mass of the people. The

voice of the people has been said to be the voice of God; and, however generally this maxim has been quoted and believed, it is not true in fact. The people are turbulent and changing; they seldom judge or determine right. Give, therefore, to the first class a distinct, permanent share in the government. They will check the unsteadiness of the second, and, as they cannot receive any advantage by a change, they therefore will ever maintain good government." James Madison threw the weight of his influence against too much faith in the masses, and in majorities. After discussing the nature of factions, he declared that the causes — the unequal distribution of property — could not be removed. He was of the opinion, however, that the government could be so organized as to cure their effects. If the faction should consist of less than a majority, then it could be defeated by the operation of the republican principle — the majority vote. But " when a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens." The purpose of the deliberations of the Convention, he declared, should be to secure the public good and private rights against the danger of such a faction, and at the same time to preserve the form and spirit of popular government. This object was attainable only in two ways. " Either the existence of the same passion or interest in a majority, at the same time must be prevented; or the majority, having such coexistent passion or interest, must be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression." Such considerations led to a government surrounded by a series of checks and balances, designed to render harmless any tendencies toward majority rule.

The champion of majority rule was Thomas Jefferson. To him a republic was a government by the citizens " in mass, acting directly and personally, according to rules established by the majority." The essence of a republic lay in action by the citizens in person, in affairs within their reach and competence; and in all others by representatives chosen immediately and removable by themselves. Moreover, he advocated " absolute acquiescence in the rule of the majority, the vital principle of republics from which there is no appeal but to force." In his first inaugural address, Jefferson set forth the right of election by the people, and the rule of the majority, as

two of the cardinal principles of democracy. He was not satisfied, however, with mere academic statements about majority rule. He founded a great liberal political party, and through it gave to his principles of democracy a consistent application. The Jacksonian democracy witnessed the enthronement of the majority and the "excess of democracy."

A logical opponent of the principle of majority rule was John C. Calhoun. Like Adams, Madison and Hamilton, he distrusted the majority, and feared its encroachment on the rights of the minority. Moreover, he urged, the minority would be treated as if it did not exist. That party, interest or section which in the name of the majority determines policy and assumes the rights of all the people, is always open to abuse. In taxation, for example, the tax can be laid by the majority party, to fall chiefly on the minority. Such are the dangers of the numerical majority. Calhoun argued that the concurrent majority, or majority of interests should displace the numerical majority, and that each interest or portion of the community should have a negative on the others. The concurrent majority would give the negative, or veto — which is the essence of the Constitution — to the positive power, which is the essence of the government. A majority of interests, then, and not of persons, should determine the course of government.

The people discover and express its will by voting. It counts heads instead of breaking them. Majority rule is open to two objections, which may become abuses. One is the view that the people are always right, or that a popular verdict is the nearest approach to truth and wisdom. *Vox populi, vox Dei.* The many mistakes of democracy are monuments to the fact that the people are not always right, and that they make many mistakes. Another objection is the tendency of the majority to become the whole. It was the view of Rousseau that the government should give effect to the general will. This was obtained by cancelling the pluses and minuses of opinion against each other, so that nothing would be left except the general will, which would become the will of all. This dethronement of the minority and its rights has never been acceptable political philosophy to the American people. It is also possible that the minority may be superior to the majority, and that the levelling influences of majority rule may work to destroy the best elements of the state. No other

method has been found, however, other than majority rule, to give effect to the principle of popular sovereignty which has received wide application.

VIII. Property.

The first settlers of America were committed to the institution of property. The idea of the corporation — probably the greatest source of colonial constitutional law — included the right to buy and sell land and other property. Moreover, the social and economic structure of most of the colonies made the ownership of property a necessity. In the Southern colonies, the planters, owners of the larger plantations, and the smaller planters formed a land-owning class. There was here a landed aristocracy, with the plantation as the center of community life. Slavery and servitude were necessary parts of the economic system. In the middle colonies, a landed aristocracy and a small farmer class, together with a merchant class, looked upon the institution of private property as a necessity. There was a large population of indentured servants. In New England, there was a larger percentage of property owners than in the other colonies. An independent class of small farmers, opposed to tenantry and servitude, increased rather than diminished the faith of the people in the efficacy of private property.

Many motives have been ascribed to the colonists for settling in America. Those moved by economic reasons could not logically oppose private property, unless they were of the servant or slave classes. Those coming for religious reasons found nothing in the tenets of their faith to prejudice their interest or belief in private property. Some have argued that private property cannot exist under a New Testament régime. It is true that a few of the first Christian leaders lived in a state of communism, for, says the Bible (Acts of the Apostles, IV, 32): "And the multitude of them that believed were of one heart and of one soul: neither said any of them that ought of the things which he possessed was his own; but they had all things common." This was probably an arrangement of convenience, and the problem of caring for or protecting their property was not a serious one. The New Testament does not refer to one's public or civic duties. Its principles are addressed to the individual, and designed to influence him in his spiritual life. It seems to appeal to the conscience of the individual, that he

may love his neighbor as himself. Most religious institutions have found it necessary to own large properties, and to maintain elaborate administrative staffs. If the churches are the agents of God on earth, they must believe in the institution of private property. It is out of the earnings and profits of their membership that the churches are supported. Property, in the large sense, is necessary to their preservation.

Property was regarded by champions of the natural rights theory as one of the great trinity of natural rights. For some reason, the Declaration of Independence did not expressly include property, but mentioned life, liberty and the pursuit of happiness instead. Among the bill of complaints, however, are a sufficient number affecting the property and the economic life of the people to indicate that this right, too, had been invaded. These included interference with legislatures and the right of representation, with a view to controlling taxation; making difficult the acquisition of new lands; the creation of new offices at the expense of the colonists; the maintenance of standing armies and the quartering of troops in time of peace and without consent; cutting off trade with the rest of the world; imposing taxes without consent; and general acts of devastation. Indeed, much that inspired the Revolution was economic. The British tax measures, and the then universal monopoly of colonial trade enjoyed by the colonizing powers greatly hastened the breach. To Samuel Adams, the end of government was the security of right and property. "Such measures," he declared, "as tend to render right and property precarious tend to destroy both property and government." The security of person and property as the end of government was so clear to John Hancock that its proof would be "like burning tapers at noonday to assist the sun in enlightening the world."

The "Founding Fathers" clearly sought to establish a government which would afford adequate protection to property. James Wilson of Pennsylvania, the greatest lawyer of the Convention, was of the opinion that the government should possess the force, the mind and sense of the people at large. Not many members were so minded as regards the rights of property. Gouverneur Morris declared that property, and not life and liberty, was the main object of society. Being, therefore, the main object of government, "certainly it ought to be one

measure of influence due to those who were to be affected by the government." He also sought to check the excesses and precipitancy of the representatives of the people through a body made up of men of "great and established property — aristocracy; men who from pride will support consistency and permanency." Rufus King of Massachusetts regarded property as the primary object of society. To Madison, and to the majority of the Convention, "To secure the public good, and private rights, against the danger of such a faction, (the majority) and at the same time preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed." In arguing for a long term for the Senate, Madison observed that the increase in population would result in the increase of those who endure the hardships of life, and who long for "a more equal distribution of its blessings." With an equal suffrage, power would fall into the hands of the propertyless, with all the dangers of a levelling spirit and an agrarian crusade. In the future, he thought, most people would be without landed or other kinds of property. These classes would either combine, making property unsafe in their hands, or would "become the tools of opulence and ambition, in which case there will be equal danger on another side." He therefore urged a property qualification for voting. Plans were suggested for such a qualification, but the matter was finally left to the states. The relation of property to government and parties or factions is clearly stated by Madison:

> The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to an uniformity of interests. The protection of these faculties is the first object of government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of the respective proprietors, ensues a division of society into different interests and parties.
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> The most common and durable source of factions has been the various and unequal distribution of property. Those who hold, and those who are without property, have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grew up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests

forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of government.

Provision had been made for the protection of property in the Constitution of the United States. The definition of property is left to the states, with the limitation that property in man shall not exist. Congress can define property under the patent and copyright laws, and may define it in territories under its jurisdiction. Certain provisions prevent a wholesale attack on private property by the government through taxation. Taxes on exports are prohibited. Revenue bills may originate only in the House of Representatives. All money drawn from the treasury must be authorized by law. Duties, imposts and excises must be uniform throughout the United States.

The United States enjoys the right of eminent domain, but the Constitution declares that private property shall not "be taken for public use, without just compensation." The government must have grounds, buildings, and piers. Moreover, society must have the usual public utilities, as railroads, street car lines, telephones, gas, and power. The ownership of land cannot stand in the way of the public good. But adequate compensation must be made. Those whose duty it is to secure the land for the government usually offer a fair price for the land. If the owner refuses to sell, the land may be occupied, and the dispute settled according to law. A body of appraisers is generally appointed, who appraise the value of the land, and this amount is offered to the owner. If he still refuses, the matter goes into court for settlement. A jury is summoned to appraise the value of the land, and from this the owner may usually appeal, but not the government. The government must pay the appraised valuation, or allow the owner to keep his land. The government must have many things in time of war. For example, the government took over the railroads during the war. All persons whose property is so taken are adequately protected by the constitutional guaranty.

In order to protect property rights, states are forbidden to pass any law impairing the obligation of contracts. In the case of *Ogden* v. *Saunders* (12 Wheaton, 213), the Supreme Court held that the obligation of the contract was the law which existed at the time the contract was made, and which provided for its definition, regulation, and enforcement. To this view Marshall dissented. This body of law can be

altered, according to the majority decision, only as regards future contracts, and not with respect to contracts entered into before the new law is passed. A contract is an agreement between the parties to do or not to do a particular thing. It is enforced by the law, and refers to property. It includes grants, franchises and charters. The charters of public corporations, such as cities, do not come within this provision. In the famous Dartmouth College case, a charter was held to be a contract, the obligation of which could not be impaired by an adverse law. To protect themselves against the perpetual unimpairment of contracts or charters, states now generally make such instruments revocable at will. This neutralizes the effect of the constitutional provision in regard to contracts to which a state is a party.

The fifth and fourteenth amendments forbid the federal government and the states respectively to deprive " any person of life, liberty, and property, without due process of law." This is the most important section of the fourteenth amendment, and has been the subject of much litigation. The term property, used in this connection, is not, according to Dr. Charles A. Beard, " limited to tangible goods having an exchange value, but it extends to every form of vested right which the possessor has legally acquired." The term " due process of law " has given rise to more discussion than the terms " life," "liberty," and " property." Article 39 of Magna Charta provides that " No freeman shall be taken, or imprisoned, or disseised, or outlawed, or banished, or any ways destroyed, nor will we pass upon him, nor will we send upon him, unless by the lawful judgment of his peers, or by the law of the land." This is the origin of the " due process " provision of the American Constitution, and according to Judge Cooley in his *Constitutional Limitations,* means in each particular case, " such an exercise of the powers of government as the settled maxims of the law permit and sanction, and under such safeguards for the protection of the individual rights as those maxims prescribe for the class of cases to which the one in question belongs. " Not only, therefore, shall private property not be taken for a public use without just compensation, but there can be no deprivation of property by the state or nation without the right of judicial trial. It should be observed, however, that the state, in the protection of the people's health, safety, and morals, may interfere with prop-

erty without its amounting to a deprivation. Private property deserves and enjoys protection, but not to the extent of prejudicing the public interest.

IX. Liberty.

One of the reasons for the adoption of the Constitution of the United States was "to secure the blessings of liberty to ourselves and our posterity." No purpose of the makers of the Constitution was more fundamental than this. Interpretations of the meaning of the word liberty are as varied as the men who have written about it. Men have looked to the Bible, and to the writings of Milton, Bentham, Mill, Herbert Spencer, Locke, Rousseau, Jefferson, Blackstone, and Montesquieu for an appropriate definition. Moreover, it has been divided into several kinds and concepts, as the Christian ideal of liberty, moral liberty, political liberty, realistic liberty, individual liberty, natural liberty, corporate liberty, constitutional liberty, and the idealistic conception of liberty. Only such speculations and practices as have moulded the American concept concern us here.

The Puritan idea of liberty was forcefully expressed by John Winthrop. He divided liberty into two classes — natural liberty, and civil or federal liberty. Natural liberty, according to him, was common to man with beasts and other creatures. Under it man can do as he pleases, for it permits evil as well as good. "This liberty is incompatible and inconsistent with authority, and cannot endure the least restraint of the most just authority. The exercise and maintaining of this liberty make men grow more evil, and in time to be worse than brute beasts." Such liberty was, therefore, absolute and unlimited. The other kind of liberty — civil or federal — "is the proper end and object of authority, and cannot subsist without it; and it is a liberty to that only which is good, just, and honest." He was interested in moral rather than in political liberty. While seeking to retain their rights as Englishmen, the Puritans were more interested in a government which would perpetuate their system of religion. "This liberty," said Winthrop, "is maintained and exercised in a way of subjection to authority; it is of the same kind of liberty wherewith Christ hath made us free."

The view of liberty as entertained by John Locke and Sir William Blackstone influenced the initial American concep-

tion profoundly. Under Locke's theory, man found himself in a state of natural liberty, or state of nature, much like the description of John Winthrop. In this state man had the liberty to do anything he saw fit to preserve his own life and that of his fellows, "within the permission of the law of nature," and to punish crimes committed against that law. The uncertainties and inconveniences of the natural law gave way to a political authority, upon which the individual conferred the natural liberty of protection of self and punishment of violations of the law of nature. On the other hand, certain rights were inherent in man, and could not be surrendered. One of these was liberty. The purpose of the state was to secure liberty, as well as life and property, to the individual. Failing to do this, the government might be overthrown. The definition of liberty given by Blackstone in his *Commentaries on the Laws of England* is worth quoting, in view of its influence on American legal and constitutional thinking: "Political liberty is no other than natural liberty so far restrained by human laws, and no further, as is necessary and expedient for the general advantage of the public."

This interpretation of liberty found its way into the Declaration of Independence. It was held to be a self-evident truth that "all men were endowed by their Creator with certain inalienable rights; that among these are . . . liberty. . . ." To secure these rights was the main business of governments and the reason for their institution. If they fail in this, they fail in all, and may be abolished in favor of other forms. In the constitutions of the states, and the writings justifying the Revolution, liberty was regarded as a natural and inherent right which could not be surrendered to a government, but which should be protected by it.

Such considerations had some influence on constitutional arrangements, which were designed to give them practical effect. The view that government rested on the consent of the governed, and existed only to secure certain rights, including liberty, led to the doctrine of constitutional limitation of the governments, both state and federal, in the interests of political liberty, and to the limitation of the right of the individual to do as he pleases in order that the state may realize its just ends. The government was merely the servant of the people, acting for them and in their behalf. To the "Founding Fathers," government, if unlimited and unrestrained, would in due course

defeat its own end, *i.e.*, the preservation of individual liberty. Only such powers as were necessary were granted to the government, and these were to be restrained by a system of checks and balances.

The Constitution of the United States was written " to form a more perfect union." Under the Articles of Confederation, the rights of the state governments and the liberties of the individual were protected through the establishment of a weak and impotent government. Yet abuses were committed through the very lack of a strong government. The Constitution, then, presented the ancient problem of the reconciliation of liberty with authority. Without power, the state cannot live. With too much power, the liberties of the people are threatened. The *Federalist* defended constitutional arrangements as the best safeguard for liberty. A strong executive and an independent judiciary were advocated, the first in the interest of efficient government, and the second as a restraint against a despotic legislative body. The greatest danger to liberty, it was asserted, came from the growing power of the legislature, which should be limited in the interest of the people's liberties. It was argued that confidence must be reposed somewhere, and that it is better to trust the constituted authorities and risk their abuse of their rights, rather than to render them powerless by many restraints. The *Federalist* was also opposed to bills of rights as guarantees of liberties. The preamble to the Constitution was regarded as a better recognition of popular rights " than volumes of those aphorisms which make the principal figure in several of our state bills of rights, and which would sound much better in a treatise of ethics, than in a constitution of government." The Constitution was regarded as the bill of rights of the Union, and it was thought superfluous to forbid things which there is no power to do. Moreover, liberty under a republican government is secured, not through a multitude of constitutional restraints, but through the fact that power is exercised by the chosen representatives of the people who are responsible and answerable to them. Liberty was to be preserved, then, through the establishment and maintenance of authority.

Washington defended this theory in his Farewell Address: " Respect for its authority, compliance with its laws, acquiescence in its measures, are duties enjoined by the fundamental maxims of true Liberty. The basis of our political systems is

the right of the People to make and alter their Constitution of government. But the Constitution which at any time exists, till changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all. The very idea of the power and the right of the People to establish Government, presupposes the duty of every individual to obey the established Government."

A very significant view of liberty was expressed by Abraham Lincoln, who declared: "We all declare for liberty; but in using the word, we do not all mean the same thing. With some, the word 'liberty' may mean for each man to do as he pleases with himself and the product of his labor; while with others, the same word may mean for some men to do as they please with other men and the product of other men's labor. Here are two, not only different, but incompatible things, called by the same name — liberty. And it follows that each of the things is, by the respective parties, called by two different and incompatible names — liberty and tyranny. The shepherd drives the wolf from the sheep's throat, for which the sheep thanks the shepherd as his liberator, while the wolf denounces him for the same act as the destroyer of liberty."

Under the fifth amendment to the Constitution, the federal government is forbidden to deprive anyone of life, liberty or property without due process of law. By section 1 of the fourteenth amendment, no state may deprive any person of life, liberty, or property without due process of law. This "liberty," according to Professor Charles A. Beard, "does not mean liberty in the abstract, but the freedom of the individual to do what he can within the limits of the law properly imposed and duly enforced, and freedom from interference by governmental authorities as long as he does not transgress the legal bounds to his sphere of individual action."

President Roosevelt, in a message to Congress dealing with the connection between constitutional law and the new conditions of our social and industrial life, declared that "What would have been an infringement upon liberty half a century ago may be the necessary safeguard of liberty today. What would have been an injury to property then may be necessary to the enjoyment of property now." In his opinion, the American judicial system was and would remain as the "safeguard of those principles of liberty and justice which stand at the foundation of American institutions. . . ." Certain members of the

judiciary, however, failed to realize that new applications of the old principles were required by new conditions. To a certain class of men it seemed to be "cruel mockery to have any court decide against them on the ground that it desires to preserve liberty in a purely technical form, by withholding liberty in any real and constructive sense." Indeed, only mischief can result when the principle of legal equality in a given case between parties, especially employers and employees, "is upset on the ground that there must be no 'interference with the liberty of contract'— often a mere academic 'liberty,' the exercise of which is the negation of real liberty."

What, then, is the American ideal of liberty, and what did the makers of the Constitution have in mind in prescribing arrangements which would give it form, substance, and continued application? A significant answer is given by Professor Arthur N. Holcombe of Harvard University, who has declared in his admirable book, *The Foundations of the Modern Commonwealth:*

> Liberty, as the word is used in the Preamble to the Federal Constitution, may best be defined as the absence of arbitrary human restraints upon personal conduct; that is, restraints other than those imposed by authority of just laws. Obedience to just laws is not only not incompatible with the enjoyment of the blessings of liberty: it is an essential part of it. The enforcement of just laws is, indeed, the means of securing liberty, since it is the condition upon which, other means failing, the individual accomplishes those of his purposes which require for their consummation the assistance of others.

X. Equality.

According to Viscount Bryce there are four different kinds of equality — civil, political, social, and natural. Civil equality implies an equal status of all citizens in the field of private law, and means equality before the law. Political equality covers the citizen with a similar participation in government as is enjoyed by his fellows, and an equal eligibility to office, subject to proper limitations as to age, education, residence, citizenship, or experience. This form of equality has been established through manhood or universal suffrage. Social equality is less susceptible of accurate definition, but means in general the absence of ranks or classes of society, or the application of tests and standards other than those of birth, wealth, or position. Natural equality is closely related to the concept of natural

liberty, and to the doctrine of natural rights. It signifies that condition of likeness into which all men are born into the world, but which disappears as physical growth and environment begin to play their part.

The doctrine of natural and innate equality of men was not held by the colonists who settled America. Holding tenaciously to their rights as Englishmen, this theory was embraced only when the enjoyment of British rights seemed hopeless. The Puritans manifested tendencies which were the very opposite of equality. Men were equal before God, similarly unworthy, and equally dependent upon him for redemption. This spiritual equality disappeared when man became saved, and hence a member of the " elect." Religious equality did not exist, as the right to choose one's own religion or faith was not recognized. Civil equality was generally recognized and granted, but political equality became a fiction through the imposition of definite religious and property qualifications. We have seen that the voter in Massachusetts, under the Charter of 1691, must be a freeholder of an estate amounting to forty shillings a year, or owner of other property worth forty pounds sterling; that the Virginia voter must be a freeholder of an estate of fifty acres of land with no house, or of twenty-five acres with a house twelve feet square, or the owner of a lot with a house twelve feet square; and that the voter in Pennsylvania must be a freeholder of an estate worth fifty pounds, or of other property worth fifty pounds. Moreover, religious and property qualifications were required of members of the colonial legislatures.

These tests for voting persisted in the early state constitutions, in spite of the levelling influences of the revolutionary doctrine of equality set forth in the Declaration of Independence and championed in the main by Thomas Jefferson. They wrote and spoke in terms of the " consent of the governed," but their state constitutional arrangements as regards suffrage and office-holding were a substantial denial of political equality, even among adult males. Catholics and Jews were the main objects of religious tests. To vote in certain of the Southern states, notably Georgia and North Carolina, one must be a Protestant. In Delaware one must believe in the Trinity. In some states, a belief in God and in a future state of rewards and punishments was required of voters. In several of the states, the office of governor and membership in the state legislature

were closed to all who were not Christians or Protestants. Moreover, taxation or property holding was not regarded as a violation of the principle of equality. The battle cry of the Revolution was "No taxation without representation." In the state constitutions it was reversed: little or no representation without taxation. In Pennsylvania, Georgia, and New Hampshire, all who paid taxes could vote. In Virginia, Delaware, and Rhode Island, only freeholders could vote. In other states, ownership of property other than real estate was accepted as satisfying the property qualification. Monied qualifications were also required of members of the legislature and of the governor.

The revolutionary doctrine of equality was borrowed from John Locke, who defended the Great and Glorious Revolution of 1688. Man was born into a state of nature which existed prior to the foundation of the state, and is free and independent of everyone. He is his own law, and provides his own protection and defence. He is the equal of his fellows — not in goods, conditions, physique, or intellect, but in the right of self-rule. He is therefore, free to rule himself, but not to rule others. Man's natural equality, Locke asserted, is the "equal right which every man has to his natural freedom without being subject to the will and authority of any other man." After the establishment of government, man, for his convenience, still retained this natural equality in the form of natural rights — life, liberty, and property — which were common to all men, and which no man could forego. Again, man, having the common right to consent to government, retained the common right to withdraw that consent. The Declaration of Independence holds as one of the self-evident truths "That all men are created equal." The same idea of equality found its way into certain papers of the colonies and states. The Bill of Rights of Massachusetts, for example, declared that the body politic "is a social compact by which the whole people covenants with each citizen and each citizen with the whole people, that all shall be governed by certain laws for the common good." Opposition to this view is found in the writings of Jonathan Boucher, who declared that individuals are not equal, but differ in everything which has to do with power or allegiance. The very existence of government is made possible by differences and inequalities.

The founder of the American ideal of equality was Thomas Jefferson. To him the foundation of the state was "the

natural equality of man, the denial of every pre-eminence but that annexed to legal office, and particularly the denial of a pre-eminence by birth." Jefferson's real view of equality is disclosed in his answer to Adams' defence of aristocracy. John Adams, in his *Defence of the Constitutions of Government of the United States of America,* made a case for aristocracy and against unlimited monarchy. There is, he contended, no love of equality or democracy as abstract conceptions. He divided society into two classes, gentlemen and simplemen, and argued for a place in government for the services of the former. Jefferson admitted that an aristocracy exists, but pointed out two kinds — a natural aristocracy, based on virtue and ability, of great use in governing society, and providing the best material for offices of government, and an artificial aristocracy, based on wealth and birth, dangerous to society, unworthy of legal recognition, and not to be entrusted with the administration of government. In a word, Jefferson believed that the fit should rule, but their choice should be made on the basis of equality. In his first inaugural address, Jefferson contended strongly for equal and exact justice, and for the careful preservation of the right of election by the people. After his retirement from the Presidency, Jefferson still held to the view that " The true foundation of republican government is the equal right of every citizen in his person and property, and in their management."

The American doctrine of equality fell upon fertile soil. Conditions were such that the principle could not help but thrive. America was first a great and unoccupied country, peopled only by aborigines, and open to settlement. There was more than enough rich agricultural land, forests, and mineral deposits for everybody. If local governments became oppressive to the settler, he could move either out of their reach, or even out of their jurisdiction. Few were rich, but few were poor. There were social gradations in colonial days which played their part in colonial society. These ranks did not find their way into politics to the extent of erecting political factions and barriers, or into business to the extent of producing economic classes in constant conflict. The differences in the colonies have already been adverted to. They did not operate, however, to prevent or even seriously to disturb national unity. Moreover, certain common elements worked to neutralize these diversities. English was the main

language, spoken almost to the total exclusion of every other tongue. There were few racial differences. The colonists were practically secure from foreign dangers or influence. Finally, they were able to coöperate successfully in prosecuting a war against Great Britain with little to hold them together except a loose political tie known as the Articles of Confederation.

The equalizing influences set in motion by Thomas Jefferson found their greatest political realization under the administration of Andrew Jackson. The original states had developed a certain rigidity in government and kept in power a certain hierarchy which served the interests of either the landed or the industrial aristocracy. The commoner, dissatisfied with this condition of things, took a leaf from the book of the early settlers who had found their lot unpleasant, and moved south, and more generally, west. The national government, even under the Democratic party and Jefferson, was under the control of the aristocracy, and the original states clung to their restrictive laws respecting suffrage and office-holding. New states were added, until they in due course outnumbered the old. The pioneer spirit, requiring such qualities as self-reliance and independence, developed a feeling of equality which soon took political form. President Jackson considered himself as having received a mandate from the people, and regarded himself as their representative. Consequently executive power received an impetus from a source never intended by the makers of the Constitution — the people. Coming from them, he could best represent them. Office-holding was regarded as the right and within the capacity of the average man. Long-continued office-holding was regarded as disqualifying one for the proper performance of his duties, and rotation in office was advanced as the cure of what Jackson was pleased to call "property in office." The suffrage was expanded. This right, once the monopoly of the freeholder, became the property of the people. The property qualifications for office were also generally removed, and these basic political rights were extended in the main to all adult males. Thus political equality, short of limitations as to race and sex, became a reality. The constitutional arrangements fathered by Hamilton and Washington to keep the government in the hands of the few received a definite set-back. Hamilton's financial doctrines and measures were openly flouted and fought, and Marshall's interpretation of the function of the

Supreme Court found no place in Jackson's political scheme of things.

The new democracy, with its principle of equality, affected all parts of the country except one section and one institution — the South and slavery. The anti-slavery movement was based on a certain theory of equality which harked back to the theory of natural rights. Man was regarded as a personality, as an end in himself, and not as a means to accomplish the ends of others. He must be regarded, not as property, but as a person. He was endowed with certain attributes, as a conscience, a rational nature which distinguishes him from animals, and the capacity for development. All men have these attributes, and in this sense all men are equal. Flowing from these characteristics, are certain rights as fundamental as the attributes themselves. They include the right to marry, to think and study, to a fair return for their labor, and to respect from their fellows as a moral and rational being. Slavery was attacked as a usurpation of these rights, and as a denial of these attributes.

Lincoln, in his famous Gettysburg address, declared that the United States, in its inception, was dedicated "to the proposition that all men are created free and equal." In a famous speech at Springfield on June 26, 1857, he gave his view of equality in the following terms: "I think the authors of that notable instrument (the Declaration of Independence) intended to include all men, but that they did not intend to declare all men equal in all respects. They did not mean to say that all men were equal in color, size, intellect, moral development, or social capacity. They defined with tolerable distinctness in what respects they did consider all men created equal — equal in certain inalienable rights, among which are life, liberty, and the pursuit of happiness. This they said and this they meant. They did not mean to assert the obvious untruth, that all men were then actually enjoying that equality, nor yet that they were about to confer it upon them. In fact, they had no power to confer such a boon. They meant simply to declare the right, so that the enforcement of it might follow as fast as circumstances should permit. They meant to set up a standard maxim for free society which should be familiar to all and revered by all — constantly looked to, constantly labored for, and even, though never perfectly attained, constantly approximated; and thereby constantly spreading and

deepening its influence and augmenting the happiness and value of life to all people, of all colors, everywhere." Lincoln therefore recognized that inequalities existed, even of race, but contended that this inequality should not follow one into the political field.

The greatest opponent in the South of the theory of equality was John C. Calhoun. To him, the theory was impossible, and should find no support among intelligent men. He said: "Taking the proposition literally, there is not a word of truth in it. It begins with, 'all men are born,' which is utterly untrue. Men are not born. Infants are born. They grow to be men." Moreover, certain inequalities are necessary for man to progress, and a process of equalization would be a backward step.

A series of constitutional amendments have given effect to the theory of equality entertained by the anti-slavery leaders, especially Lincoln. These amendments are fully discussed elsewhere. The thirteenth amendment provided for abolition of slavery. The fourteenth amendment conferred citizenship on all persons born or naturalized in the United States and subject to its jurisdiction. States were forbidden to pass laws abridging the privileges or immunities of citizens of the United States, or to deny to any person within its jurisdiction the equal protection of the laws. Under this amendment, native and naturalized citizens are on a plane of equality in all matters, except that only native citizens may be President or Vice-President of the United States. By the fifteenth amendment, the right of citizens to vote cannot be denied or abridged by any state on account of race, color, or previous condition of servitude. Finally, by the nineteenth amendment, the right of citizens to vote cannot be denied or abridged by the United States or by any state on account of sex.

In recent years, political parties and leaders, recognizing that inequalities must and do exist, have fallen back on the slogan, "equality of opportunity." This is but a recent affirmation of an old principle. The *Federalist*, in arguing against representation on an occupational basis in the popular assembly, observed that the representative body would be composed chiefly of "landholders, merchants, and men of the learned professions." But "the door ought to be equally open to all," for "there are strong minds in every walk of life that

will rise superior to the disadvantages of situation, and will command the tribute due their merit, not only from the classes to which they particularly belong, but from the society in general." In the Republican platform of 1908, after recounting the great wealth of the United States under Republican rule, the party declared for " the principle that in the development and enjoyment of wealth so great blessings and so benign there shall be equal opportunity for all." The Democratic platform of the same year asserted that the Democratic party " is the champion of equal rights and opportunities to all." The Progressive party platform of 1912 sought to establish this principle through a number of concrete proposals of reform. It became the chief text of Theodore Roosevelt, the candidate of the Progressive party for President. The Republican platform of the same year declared that " it is important that the rights of every individual to the freest possible development of his own powers and resources and to the control of his own justly acquired property, so far as those are compatible with the rights of others, shall not be interfered with or destroyed." The La Follette platform of 1924 provided as follows: " The equality of opportunity proclaimed by the Declaration of Independence and asserted and defended by Jefferson and Lincoln as the heritage of every American citizen has been displaced by the special privilege of the few, wrested from the government of the many."

The American ideal of equality is, therefore, an equality of rights — an equality before the law guaranteed by the fundamental law of the land. Little attention is given to the natural equality enjoyed by man in a state of nature. Lord Bryce has declared that the Americans of the Revolution started from two fundamental principles — popular sovereignty and equality. Concerning equality and cognate principles, he declared:

> This (equality) had from the first covered the whole field of private civil rights with no distinctions of privilege. Equality of political rights was for a time incomplete, voting power being in some states withheld from the poorest as not having a permanent stake in the community, but in the course of time all the states placed all their citizens on the same footing. Along with these two principles (popular sovereignty and equality) certain other doctrines were so generally assumed as true that men did not stop to examine, much less to prove them. Nearly all believed that the possession of political rights, since it gives self-respect and imposes re-

sponsibility, does of itself make men fit to exercise those rights, so that citizens who enjoy liberty will be sure to value it and guard it. Their faith in this power of liberty, coupled with their love of equality, further disposed them to regard the differences between one citizen and another as so slight that almost any public functions may be assigned to any honest man, while fairness requires that such functions should go round and be enjoyed by each in turn. These doctrines, however, did not exclude the belief that in the interest of the people no one chosen to any office must enjoy it long or be allowed much discretion in its exercise, for they held that though the private citizen may be good while he remains the equal of others, power is a corrupting thing, so the temptation to exceed or misuse functions must be as far as possible removed.

XI. Representation.

Interference with what they believed to be their right of representation, and the imposition of taxes without their consent, did much to bring the colonists to a state of war with England. The representative principle was writ large in the ideas and experience of the colonial fathers. Each colony had some basis of representation, and some representative institution. In spite of British interventions, they fell into the habit of self-rule in regard to certain things. This habit, once formed, was too deep-seated to be given up. It was through the representative assembly that the power of the governor, acting in the name of the king, was resisted, checked, and eventually curtailed. The same assembly was the means of protest against British misrule, and became both the means of spreading revolutionary propaganda, and the chief agency of colonial government during the revolutionary period.

The right of representation was regarded as founded on the "eternal law of equity." But the colonists did not stop with this assertion. The Bill of Rights of the Continental Congress of 1774 set forth that the ancestors of the colonists, first settling the colonies, were at the time of their emigration, in full possession of the rights and liberties of free and native Englishmen, and that such rights had fallen upon their descendants. The fourth resolution pertained exclusively to the right of representation:

Resolved, 4. That the foundation of English liberty, and of all free government, is a right in the people to participate in their legislative council: and as the English colonists are not represented, and from their local and other circumstances cannot properly be represented in the British parliament, they are entitled to a free and

exclusive power of legislation in their several provincial legislatures, where their right of representation can alone be preserved, in all cases of taxation and internal polity, subject only to the negative of their sovereign, in such manner as has been heretofore used and accustomed: But from the necessity of the case, and a regard for the mutual interests of both countries, we cheerfully consent to the operation of such acts of the British parliament, as are, bona fide, restrained to the regulations of our external commerce, for the purpose of securing the commercial advantages of the whole empire to the mother country; and the commercial benefits of its respective members, excluding every idea of taxation, internal or external, for raising a revenue on the subjects in America without their consent.

The most speedy, effectual, and peaceable measure, in the minds of the members of the Congress, designed to secure a redress of these grievances, was a non-importation, non-consumption, and non-exportation agreement, which was adopted by the Congress.

Jefferson gave the subject of British interference with the right of representation a large place in the Declaration of Independence. A denial of this right was of course an interference with a form of one's liberty, and also of one's property. But the denial goes even deeper than that — to the fundamental basis of government. It is an abrogation of the principle that government is based on the consent of the governed. A corollary of the representative principle was that property could not be taken in the form of taxes except by vote of representatives. The Declaration of Independence cites the following interferences with the right of representation:

He has refused his assent to laws most wholesome and necessary for the public good.

He has forbidden his governors to pass laws of immediate and pressing importance, unless suspended in their operation till his assent should be obtained; and, when so suspended, he has utterly neglected to attend to them.

He has refused to pass other laws for the accommodation of large districts of people, unless those people would relinquish the right of representation in the legislature, a right inestimable to them, and formidable to tyrants only.

He has called together legislative bodies at places unusual, and distant from the depository of their public records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved representative houses repeatedly and continually, for opposing with manly firmness his invasions on the right of the people.

He has refused for a long time after such dissolutions to cause others to be elected, whereby the legislative powers, incapable of annihilation, have returned to the people at large for their exercise; the state remaining in the meantime, exposed to all the dangers of invasion from without and convulsions within.

The principle of representation and the representative idea found a consistent application in the early state constitutions. The legislatures, coming from the people — the source of law and authority — were invested with special powers and were held in great public esteem. The executive, typifying in a sense all that was opposed to the representative idea, was stripped of its power. The ideas of the Revolution had borne fruit. Their political laboratory was the first state constitutions. The same is true of the Articles of Confederation. The basis of representation was simple — equality of voting power. The Articles represented the complete enthronement of the Congress, in so far as any power at all was delegated.

The makers of the Constitution wrestled — not with the theory of representation as an abstract right, but with the problem of working out a scheme which would be acceptable to most of the states, and which would at the same time avoid the usual excesses of too much legislative, and therefore representative government. The powers of the legislature were greater and generally more extensive than those of the other departments, and could not be so easily defined and limited. Moreover, the legislature controlled the public purse. These considerations dictated a certain curbing of the representative assembly, based on population, through the establishment of a smaller and more compact one, based on the principle of equality of representation of all units in the federal system. The single legislative bodies, said the *Federalist,* were governed by passion. "The necessity of a Senate," it affirmed, "is not less indicated by the propensity of all single and numerous assemblies, to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions." The Senate would also remedy another defect of the representative assembly — "a want of acquaintance with the objects and principles of legislation." A long term would give a senator experience in legislation and would prevent the necessity of so much repealing and amending legislation. Moreover, frequent elections imply changes in personnel, opinions, and policies.

This proves the necessity of some stable institution in the government. The select and stable character of the Senate would commend itself to foreign powers, and would give to the United States a national character. The Senate, therefore, would give that continuity of policy which a representative assembly is totally unprepared to give. The *Federalist* contended that the general interests should find representation in the lower house, but should not extend to individuals, or even to all interests. Three classes were entitled to such representation: the merchants, the landed interests, and the learned professions. The mercantile and agrarian groups will naturally be opposed to each other, as their interests are opposed, and the professional group would exert a mediating rôle, resolving conflicts between them. The *Federalist* also contended for a small legislative assembly in the lower house, on the ground that it would be in fact more representative of the people and their interests than a larger, unwieldy body. The point was made that any number over and above that required for purposes of adequate representation would defeat the very end sought in the establishment of a representative assembly. Moreover, it was declared that "The machine will be enlarged, but the fewer, and often the more secret, will be the springs by which its motions are directed."

The writings of John Adams are, in the main, in keeping with the theories advanced by the *Federalist*. To him there must be three institutions of government in every state — a first magistracy or executive, a senate or small council, and a larger representative assembly. The elements of monarchy, aristocracy, and democracy respectively would find adequate and necessary representation in these institutions. The two branches of the legislature, therefore, would be made up of the democratic and aristocratic elements, with the executive power as a strong and relatively permanent force, authorized to reconcile conflicts and to break deadlocks. Later he observed that the American government possessed the following checks and balances: the states and territories against the central government; the House against the Senate; the executive against the legislature; the judiciary against all departments and units of government; the Senate against the executive as regards appointments and treaties; the people against their representatives; the state legislatures against the Senate; and the electors against the people.

The constitutional arrangements as regards representation, discussed elsewhere in this volume, were designed to provide for representation of the people, but also to surround the representative assembly with sufficient checks to keep it within due bounds. The most direct check was the establishment of a smaller legislative body, with a less changing personnel and longer tenure, based on the principle of equality of representation, and having coördinate legislative authority, with the exception of revenue bills, which originate in the House, and treaties and appointments, which are committed to the Senate and the President. Another check was the executive, with the power of veto, and still another the judiciary, which assumed the right of judicial review of legislation. At the beginning, only the members of the House of Representatives came directly from the people. The checks provided for it came only indirectly from the people. The principle of direct election has since been extended to the members of the Senate. The method of electing the President results generally in his choice by a popular majority of voters. The President usually regards his election as a mandate from the people. The judiciary is recruited by appointment by the President and Senate as vacancies occur, due to death, resignation, or removal from office. The judicial department has been attacked within recent years, due to its alleged removal from the people, and, according to its opponents, its arbitrary exercise of the right of judicial review. The principle of direct election, therefore, so opposed by the makers of the Constitution, has been applied in substance to the Senate and the executive, and some would extend its operation to the federal judiciary. This is a triumph through experience for the representative idea, and is a departure from the basis of election conceived by the fathers.

XII. The ideal of rights.

The leaders of the American Revolution rested their claims for their asserted rights first on the charters which had been granted to them by the kings of England. These charters, in the main, provided for the constitutional organization of the various colonies, royal, proprietary, and corporate, and defined the relation of the grantees to each other and to the king. The king was the grantor, and his relations were usually with the direct grantee. The charter, therefore, con-

cerned only the grantor, the immediate grantee, and those having certain rights flowing from the grantee. The corporate character of the colonial governments resulted in a public body sufficient to require of its members submission to a sovereign, and in a private contractual arrangement sufficient to admit of impersonal, business-like control. There was no protection by the grantee or those claiming under him against a breach of charter by the royal grantor. Indeed, in cases of doubt, the instrument must yield to the interpretation of the king. The grantors soon found convenient reasons for breaking their charters, until they began to regard their enforcement in the colonists' behalf as a matter of grace and not of right. Often compensation in some form was required as a guaranty of charter enforcement. The only remedy against a breach of charter was a petition of right, the granting of which was at the discretion of the courts, which until 1700 were under the control of the king.

Professor McIlwain has pointed out in his penetrating book on the *American Revolution* that the colonial charters were subject to attack from three sources — the prerogative of the crown, the courts, and the Parliament. The Statute of Monopolies was passed in 1614, but its operation did not extend to the colonial charters. Much could be done on the ground of prerogative alone, in absolute defiance of the terms of the charters. The case of the Maryland charter is a leading one. Lord Holt gave as his opinion that the king could appoint the governor of Maryland without taking account of the provisions of the charter granted to Lord Baltimore. No judicial process could be instituted against the charter so long as the governor was responsible to Lord Baltimore under the financial clauses. The political and representative features of the charter could be ignored so long as the revenue features were complied with. Interference also came from the courts. If the powers granted under the charters were abused, or if acts *ultra vires* were committed, the instruments could be vacated by writs of *quo warranto* or *scire facias*. Massachusetts lost her charter in this manner in 1684. To the colonists, the charters were constitutions of government, but to the courts and under the law they were grants, concerning the parties only (the grantee and grantor), and giving no authority to the thousands of people claiming under them. There was also danger from the British parliament. As prerogative was re-

duced, parliament gained in authority. It was within the power of this body, therefore, to attack, in the name of its increased authority, the colonial charters as the king had done. The charters, therefore, while furnishing models of fundamental law, were in time abandoned as sources of rights claimed by the colonists.

Not finding the charters to be a satisfactory source of rights, the colonists turned to the law of nature and of reason. The law of nature, in spite of its vagueness, was regarded as one of the main sources of the English law. The English constitution was founded on the natural law. The natural law therefore forms a fundamental part of the English constitution, and the rights under it follow British subjects wherever they might be. The empire was regarded as one commonwealth, with parliament as the sovereign power. It was, however, a free state, and like all free states, had a fixed constitution from which the supreme legislative body derived its authority, and which it could not transcend without destroying its own foundation. James Otis, one of the adherents of this theory, admitted that parliament had the lawful right to bind the colonies, even to the extent of annulling every American charter, but every American, aside from the charters, by the law of God and of nature, by the common law, and by act of parliament was entitled to all the rights of an Englishman. If the parliament abuses its privileges, however, it must be obeyed, for it only can repeal its statutes. The supreme power in the state is *jus dicere* only; *jus dare* belongs to God. Parliaments declare what is for the good of the whole, but it is not the declaration that makes it so, but a higher authority, viz. God. The power of the parliament, therefore, is and must be absolute, but abuses of this power is preferred to royal control alone. The enjoyment of the rights of the British constitution, therefore, "is an essential, unalterable right, in nature, engrafted into the British constitution, as a fundamental law, and ever held sacred and irrevocable by the subjects within the realm, that what a man has honestly acquired is absolutely his own; which he may freely give, but cannot be taken from him without his consent." This acquiescence in the theory of the supremacy of parliament was disappointing in its results. At first the colonists sought protection against an arbitrary king. Later, when oppressive measures were passed, and their petitions

went unanswered, they found that they needed protection against an arbitrary parliament.

The Stamp Act Congress, while contending for the rights of the colonists, declared "That His Majesty's subjects in these colonies owe the same allegiance to the Crown of Great Britain that is owing from his subjects born within the realm, and all due subordination to that august body the Parliament of Great Britain." But such doctrine was of no avail, and the colonists then fell back on their rights under the British constitution, independently of the law of nature. The definite break from the parliamentary theory came with the Declaration and Resolves of the First Continental Congress. The Declaration referred to one statute of Parliament which claimed for this body the power, of right, "to bind the people of America by statutes in all cases whatsoever." The members of the congress declared that by the immutable laws of nature, the principles of the English constitution, and the several charters or compacts, the inhabitants of the colonies were entitled to life, liberty, and property, which they have not allowed to be disposed of without their consent; to the rights, liberties, and immunities of free and natural-born subjects within the realm of England, as local circumstances would permit; to a "free and exclusive power of legislation in their several provincial legislatures, where their right of representation can alone be preserved, in all cases of taxation and internal policy, subject only to the negative of their sovereign;" to the common law of England, and especially the right of trial by jury; to the benefits of English statutes of advantage to them which existed at the time of their colonization; to rights and immunities confirmed by the royal charters or secured by their several codes of provincial laws; to the right of peaceable assembly and of petition; to freedom from a standing army in time of peace without their consent; to the exercise of legislative power by their own representative assemblies rather than by a council appointed by the Crown. The resolves then cited the statutes in violation of these rights, and the congress limited its action to a non-importation, non-consumption, and non-exportation agreement; to an address to the people of Great Britain and a memorial to the people of British North America; and a loyal address to the king, agreeable to these resolutions.

These resolutions appealed to three sources of rights, the

law of nature, the charters, and the English constitution. The first two had been relied upon before. It is to be observed that the colonists at this time addressed themselves to parliamentary abuses, and referred in the main to rights of Englishmen under the English constitution, although others are mentioned. The right of trial by jury is a development of Teutonic, but more properly, Norman ideas, and finds a definite place in the English constitutional system. Its place among rights under the natural law is not so clear. The right of legislation, or representation, being chiefly a British development, was also properly included. This right carried with it two others, the right of taxing themselves, and of local self-government. The identification of representation and of taxation was the main constitutional dispute. Both sides could cite cases of identification and of non-identification. Generally, however, the argument of identification turned chiefly in favor of the colonists. It was also claimed that the colonists enjoyed virtual if not actual representation. While certain great English cities did not return members to parliament as such, yet their citizens could vote for parliamentary candidates, and this inequality did not alter the actual character of their representation.

The colonists in due course abandoned the constitutional sources of their rights i.e., the charters, the natural law as a part of the English constitution, and the constitution itself. With the advent of the Revolution, the movement became political. Appeals were addressed, not to the king, the parliament, or Englishmen, but to the world. They sought, not membership in the British system on a basis of equality, but independence. They invoked, not their charters, the British constitution, or the natural law as a part of the constitution, but the natural law itself. This last step began with the Declaration of Independence, which is virtually a statement of its principles and justification. Professor Carl Becker has declared that the Declaration is interesting for what it omits as well as for what it includes. The British parliament is not mentioned, although the authority of the parliament over the colonies was a main question. Also, there is omitted, as if by design, the term "rights of Englishmen," although this had been the basis of their former contentions. Again, their grievances were directed against the king. The general ground of the natural rights of man, therefore, was substi-

tuted for the rights of British subjects. On this new basis, they were not responsible for, or limited by the obligations falling on British subjects. It implied, therefore, a violation of general rather than constitutional rights, a loose rather than a strong constitutional tie, and a disposition to separate rather than to come to an accommodation. A discussion of the Declaration and the natural rights theory is given elsewhere.

The term " rights " is generally understood to designate the principles, the violation of which led to the Revolution and the establishment of the new government. As the natural rights of man, it includes life, liberty, and property. It may refer to the rights of Christians, as the right of freedom of worship. It embraces the rights of free British subjects, as life, liberty and property, no taxation without representation, legislative power, and freedom from arbitrary government. These rights have been secured substantially to the American people by the American constitution in the form of the first eight amendments, commonly called the " Bill of Rights."

XIII. The ideal of revolution and independence.

Revolution was used by the American colonists as a last resort, and only as a means to an end. Attempts at an adjustment of difficulties involved a consideration of the nature of the British imperial system, and of the place of the colonies in that system. There was at first an earnest hope for some form of imperial organization under which the king in parliament would retain a supremacy in keeping with the rights and liberties of the British constitution, and at the same time leave the colonists in substantial control of their local affairs. According to Professor Randolph G. Adams' *Political Ideas of the American Revolution,* there were three concepts as to the nature of the empire held during the period immediately preceding the Revolution: 1. That Britain was the head and mistress of her dominions, and that the existing parliament was supreme over and sufficiently representative of all the overseas parts of the empire as well as the British insular ones. 2. That the empire was virtually a federal state which should be governed by an imperial parliament representing all the dominions. The existing parliament was regarded as not an imperial one. 3. That the colonies were essentially states in international law, with their legislatures only supreme over them. Their only connection

with the empire was through the Crown, and their position as units in the British imperial system did not prejudice their international position. The parliament at Westminster, therefore, was only one of a number of coequal legislatures. Opinion in America, as in England, was divided on these positions. Prevailing American opinion, however, held to the third concept, which led logically to the Revolution and to independence. The position of the Americans, then, toward the last, was that the empire was not one body politic — one commonwealth governed from England, nor an imperial federal union, but rather a league of self-governing nations united through the Crown. The spirit of this form of organization was an "imperial partnership," a group of "autonomous nations of an imperial commonwealth." An approximation of this ideal is the Dominion of Canada and the other self-governing dominions, and more latterly, the Irish Free-State.

The American theories came into conflict with the British views of the constitution and of the supremacy of parliament. The English held to the view that parliament was supreme throughout the empire. There was no legal difference between laws in their nature constitutional and ordinary laws, in so far as the source of authority was concerned. The parliament made all laws, and could change all laws. This included constitutional law, and a constitution contrary to the will of parliament was inconceivable. To the Americans, the parliament was the creature of the constitution, not the creator, and that body, like British subjects, must be governed by it. Said Thomas Paine: "A constitution is a thing antecedent to government and a government is only the creature of the constitution." Samuel Adams declared that "the constitution is fixed; it is from thence that the supreme legislative as well as the supreme executive derives its authority. Neither then, can break through the fundamental rules without destroying their own foundation."

The political theory of the Revolution fitted admirably into this constitutional doctrine. Men were equal in the possession of rights, which were to be protected by governments set up by the people through laws defining the rights and setting forth the measure of protection. Government was the protecting and securing agent, which was limited and governed by these laws, and the acts of the agent contrary to or in defiance of the laws would render him liable to removal.

The government was not above the law, but was regulated by it. Acts of government, therefore, not in conformity with the fundamental law, were in a sense unconstitutional. It was natural to regard these laws, or the conditions of the social contract as a sort of constitution. We have observed that the colonists claimed the rights and liberties of Englishmen. Certainly the motive for settling in the new world was to escape the application of some of the English laws. The Massachusetts Bay House of Representatives declared in 1768 that "This House is at all times ready to recognize his Majesty's high court of Parliament as the supreme legislative power over the whole empire, its superintending power in all cases consistent with the fundamental rules of the constitution." These were the rules to which the colonists referred, over the heads of the government, because it was a higher authority. Such laws were to be found in the great charters and landmarks of British constitutional law. They were also to be found in the law of nature, which had become a part of the British constitution. The asserted supremacy of the parliament, therefore, was a usurpation of constitutional rights which would in the end justify resistance.

The conflict of these ideas could lead only to a revolutionary movement, which, if successful, would establish a condition of independence. The early hope of some form of imperial organization was definitely frustrated by the growth of both the doctrine and practice of parliamentary supremacy. With the supreme agent of the state resisting the colonial theory, an appeal to the higher authority of the constitution was the final course open to the colonists. The identification of the law of nature with the law of the British constitution provided the colonists with both a political and constitutional justification of the Revolution.

The Revolution was a many-sided movement. It was political in that it sought to establish a new state on the basis of the social contract; constitutional in that it would sever an existing constitutional tie and would appeal to a law or constitution which was above the government and its creator; social in that it brought together all stratifications of society in defence of these rights, and brought to the lower classes a new sense of dignity and duty through the responsibilities assumed; and economic in that the colonists, through political action, would establish a constitution, the agent (the govern-

ment) of which would secure them in their rights and deliver them from the dreaded economic measures of the British government.

XIV. The ideal of government.

The prevailing American idea that government was founded on compact antedated the Declaration of Independence. The theory of the social contract was used by Hooker, Hobbes, Locke, and Rousseau, to explain and justify different orders of society. The appeal to the natural law and natural rights is found in the writings of certain of the American philosophers, and in the documents of protest which appeared before the Declaration. It was not until 1776 that revolution was determined upon as the only way to preserve these rights. The right to change the government under which one lived was one of the cardinal principles of Locke's contribution. James Otis declared that government "has an everlasting foundation in the unchangeable will of God, whose laws never vary. . . . Government is therefore most evidently founded on the necessities of our nature. It is by no means an arbitrary thing, depending merely on compact or human will for its existence." The colonists, he argued, were entitled to all the rights of nature as were other Europeans, and "By being or becoming members of society, they have not renounced their natural liberty in any greater degree than other good citizens, and if 'tis taken from them without their consent, they are so far enslaved."

The Declaration and Resolves of the First Continental Congress declared that the colonists were "entitled to life, liberty, and property, and they have never ceded to any sovereign power whatever, a right to dispose of either without their consent." The Constitution of Pennsylvania, which followed the Declaration of Independence by a few months, asserted that government was instituted for the security and protection of the community as such, and to enable its members to enjoy their natural rights. Moreover, "whenever these great ends of government are not obtained, the people have a right by common consent to change it, and to take such measures as to them may appear necessary to promote their safety and happiness." Just governments were declared to exist in all the states, "derived from and founded on the authority of the people only." The people "by common consent" met "delib-

erately to form for themselves such just rules as they shall think best for governing their future society." The current views were best stated in the first three sections of the Virginia Bill of Rights of June 12, 1776:

1. That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot by compact deprive or divest their posterity; namely, the enjoyment of life and liberty, and pursuing and obtaining happiness and safety.

2. That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.

3. That government is, or ought to be instituted for the common benefit, protection, and security of the people, nation, or community; of all the various modes and forms of government, that is best which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration; and that when any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, unalienable and indefeasible right to reform, alter or abolish it, in such manner as shall be judged most conducive to the public weal.

Current political theories and their diversities were well represented in the writings of Hobbes, Locke, and Rousseau. All three writers espoused the conception of the social contract, but their applications of it were very different. Hobbes inferred from it that men had consented to the establishment of an all-powerful sovereign. The state existed to maintain order and the rights of property; but their maintenance was within the discretion of the sovereign, who made the laws but was not himself bound by them. Any state was better than no state, since the condition of war which existed previous to the establishment of society was more terrible than the tyranny of the worst prince. The sovereign power, when once relinquished and conferred, could not be alienated. This theory was applicable to the supremacy of the king, and to some extent, to that of the parliament at a later time. Locke drew different conclusions. There were certain inalienable rights which could not be surrendered by the individual. The state was established to maintain life, liberty, and property through the institution of a known law and a common judge. The purpose of the state was secured through the establishment of a government, the duty of which was to protect life, liberty, and property. Whenever government failed to secure

these rights, it might be overthrown, and a new one set up in its place. This proved to be acceptable philosophy to the Americans. Rousseau held that the individuals conferred all their rights and powers on an organized society which was the sovereign power, and which gave expression to its sovereignty through the general will. Government, being only an administrative agent, could be changed at will by the sovereign power.

Instead of adopting one of these extremes, Americans took the middle ground advocated by Locke. To admit that the sovereign only could maintain rights, that the sovereign was not bound by law, and that sovereignty, once conferred, could not be alienated, would be to favor royalty and the consequences of dynastic quarrels. On the other hand, to conclude that the government could be changed at will without qualification was not satisfactory. Americans were satisfied to reason that certain rights could not be conferred; and if the government formed to secure these rights could or would not guarantee them, it could be overthrown. The right of revolution, then, was justified only on the ground that a government failed to secure the natural rights of man. The Declaration of Independence is practically a statement of these principles. It was declared that when any form of government did not secure these ends, it was the right of the people to abolish it. But while the right was recognized, stress was laid upon the seriousness of the step. "Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes; and accordingly all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed." The Declaration then goes into detail, enumerating the failures of the British government to secure these rights, thereby justifying political separation from England. There is, after all, a certain wisdom in the American course. To have adopted the view of Hobbes would have led either to colonial submission or to the establishment of an independent monarchy with all its dangers; while to have followed the principles of Rousseau would have meant the carrying of the right of revolution to the straining point. Its effect was seen in France, when the effort was made to carry liberty to all oppressed peoples.

Jefferson was a thorough believer in the philosophy of the Declaration. He thought, however, that the consent of the governed could be preserved as the permanent basis of government only through frequent renewals of the contract, and failing that, through revolution or rebellion. He argued that in any given society one-half of those over twenty-one years of age will have disappeared within a period of approximately nineteen years. Every nineteen years, therefore, constitutions and contracts should be renewed or revised. Without this they should have no binding force. Moreover, revolution was a good tonic for the health of government, and though bitter, was a wholesome remedy. It was better that people should rebel than passively acquiesce in oppressive measures. "God forbid," he said, "that we should ever be twenty years without such a rebellion." The spilling of blood occasionally, as well as eternal vigilance, was the price of liberty.

The philosophy of the Declaration served its best purpose as an explanation to the colonists of their revolutionary causes and aims. It was a document which told of wrongs demanding redress, and was a battle-cry for action. It had some concern for the engine of war which they had to create, for it declared that the new states had "full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may of right do." Its theories were rejected by the loyalists and by Englishmen because they were opposed to the great event which it ushered in. It was received with a certain enthusiasm in France which foretold a more formidable and more radical revolution. The doctrine found its way into most of the state constitutions, and has remained there in one form or other, despite revisions. The philosophy was adopted by the Latin-American states when seeking their independence from Spain.

It is often asserted that the constitutional movement in the United States, and most constitutional movements of the nineteenth century have rejected the natural rights philosophy of the Declaration of Independence. It is a fact that this theory of government is not found in the Constitution of the United States, although certain of the rights are protected by means of the early amendments. It is to be observed, however, that two ideas have in a sense persisted in the Ameri-

can constitutional system. One is the idea that the government is based on the consent of the governed, or the principle of majority rule. The idea that the people are sovereign, and that all power came from them, and not from the states, was adverted to at one time to save the union from disintegration. Again, the appeal which the colonists made to the natural law, to the British constitution, and to their inalienable rights over and above the British government, established in their minds that the state and the government were not above the law, but were subject to it, and that the fundamental constitution must be supreme. The constitutional application of this principle is found in the written constitution, which is an instrument for the government of the executive, the legislature, the courts, the states, and the people, and is also found in the practice of the courts to review and disallow legislation in contravention of it, which has come to be known as the doctrine of judicial supremacy or review. The idea of checking an unruly parliament was carried over into the Constitutional Convention in the form of restraints provided for a popular legislative body.

The chief value of the Declaration, however, does not lie in its constitutional features. The independence which it symbolized became something precious to the Americans, which the people, after its establishment, sought to preserve. They were interested rather in a "more perfect union." The principles of the Declaration could not help much at this juncture. It should be remembered however that the Declaration of Independence is not and was not intended to be a constitution of government. It was a bill of particulars against the English king, and a declaration to the world of the independence of a new state, together with a justification of this step. Admirers of the Constitution often decry and depreciate the significance of the Declaration of Independence. In the life of every state, such documents which symbolize great events are necessary. The entire story of our national life is not to be found in the formal instrument called the Constitution of the United States. The political, social, and humanitarian aspects are also important. In spite of what is today called a mistaken political philosophy, the colonists appealed through the Declaration to a higher authority or law, which is the refuge of all peoples and nations in times of great crises. The test lies, not in the accuracy of the

theory, but in the duration of the concrete thing which was established. Our continued independence is abundant evidence of this.

XV. Local self-government.

The origin of the principle of local self-government lies deep in the roots of the past. So distinguished an authority as Professor William B. Munro has declared that it was in the field of local government that representative institutions first developed, and where they have become most tenacious. "It was there," he has observed, "that men first became familiar with the principles of civil liberty, and obtained their first lessons in free government as a practical art." In illustration of this principle, he has quoted de Tocqueville: "Local institutions constitute the strength of free nations." It is certain that the practice of popular rule had its beginnings in small areas of land, inhabited by a small number of people. Local assemblies of freemen or heads of families may be said to mark the origin of free government. Such associations were prompted, according to Lord Bryce, by three motives: self-defence, the prevention of internal strife, and the disposal and management of communal lands. Such purposes are not so far removed from the objectives of the modern complex state.

The success of the British and American political systems is in large degree the success of their local institutions. The British system is a matter of centuries of development. During the Saxon period there were local government units called shires, hundreds, townships, and boroughs. The shire eventually developed into the county, the township into the feudal manor, and the borough into the municipality, while the hundred disappeared and the parish appeared as a new local government unit. The county, borough and parish emerged as the principal organs of local administration, and it is to these three that we look for the origins of American local institutions.

The colonists, settling along the Atlantic seaboard, brought with them the centuries-old tradition of local self-government. They found new conditions, but their local governments were in the main modelled on British types. In New England, the dominant local government unit was the town. Its organization and functions resembled the English parish. The neces-

sity of defence, the predominance of small farms rather than estates, and close association for religious purposes resulted in concentrated groups of population, which of course assumed the form of towns. Out of this grew the famous town-meeting, the most democratic political institution in the New World. In the South, the county became the leading local government unit. Here the plantation was the center of community life, and the great estate rather than the small farm formed the basis of land ownership. These estates were located far from each other. The county, clearly a rural area, was the logical unit. It afforded little opportunity for the people to meet together. Local officials were appointed by the governor, and the qualified voters elected the county's representative to the colonial assembly. In the middle colonies, the population of which consisted of an admixture of social and economic classes of the South and of New England, there was also an admixture of town and county government. Also, certain towns were chartered as colonial boroughs. These were like the English boroughs, except that in the colonies the governor stood in place of the king.

It is not my purpose to follow here the development of local institutions in the United States, except to remark that they are no less significant today than at any time in the past. Lord Bryce has said that local communities "may be called the tiny fountain-heads of democracy, rising among the rocks, sometimes lost altogether in their course, sometimes running underground to reappear at last in fuller volume. They suffice to show that popular government is not a new thing in the world, but was in many countries the earliest expression of man's political instincts." Local institutions such as prevail in the United States and in Switzerland have had the greatest part to play in the development and preservation of the free institutions of these countries. They recognize at the outset the value of differences in thought, and of diversities of the social and economic structure. "Man's noblest part," declared Secretary of the Interior Franklin K. Lane, in addressing a group of societies interested in Americanization, "is found in the local attachments, sentiments, narrowness and convictions which he forms as a citizen of a community. If he is sound in these, then the nation is secure." Local government communities are virtually political laboratories for the citizenry, and here our political behavior begins and is

moulded. The work of the community, including its government, is done by the people of the community. The people learn to work for and with their neighbors. It is splendid training for the electorate in preparation for national elections. Moreover, it furnishes the best possible recruiting ground for qualified candidates for responsible positions in the states and in the nation. Much is written these days of the small-town crowd and the "Main Street" mind. Along with this is the tendency to scoff at the plain and basic virtues. These things may not count for much at the jazz dance, but they are still in demand in the office and factory, store and bank. While this type of mind may not appeal to the intelligentsia, it does have the confidence of the masses. It entrusts the headship of the government to a Wilson, schooled in the stern realities of the Scotch Presbyterian faith, or a Coolidge, steeped in the Puritan school of frugality and simplicity.

The institutions of local government are creatures of the state governments, and in a sense are dependent upon them for their very existence. The principle of diversity is therefore recognized in the larger units of government short of sovereignty. The Constitution, after all, only delegates the necessary powers to the federal government. More is reserved to the states than is delegated to the central government. Practically all of our commercial and private relations are regulated by state rather than federal law. The life of the ordinary citizen is almost wholly regulated by local laws, state, county, and municipal, while federal matters seldom concern him. Powers which concern the entire people are vested in the national government, such as the foreign relations power, waging war, making treaties, and regulating currency, in order to preserve order within and to prevent aggression from without. The states were given the primacy in the regulation of domestic and local affairs. This has made possible a close relation between the citizen and his government, and a general diffusion of political life which makes government sound and wholesome.

The tenth amendment to the Constitution of the United States is the bulwark of the local government units. The first eight amendments, called the Bill of Rights, forbade the Congress to pass laws interfering with certain fundamental rights which had been guaranteed by most of the states. The ninth and tenth amendments reserve and confirm to the states or

the people, the powers not enumerated or delegated to the United States. The eleventh amendment forbade the exercise by the federal courts of jurisdiction over any suit against a state by a citizen of another state or of a foreign nation. During the Civil War the doctrine of states rights was pushed beyond its proper limits. The political, and later the judicial branches of the government, through action and interpretation, saved the federal government from dissolution, and the country from disaster. The Civil War amendments greatly strengthened the power of the central government, and weakened the state governments. The more recent amendments manifest a tendency to invade further the sphere of state action. Many people seek, by amendment of the Constitution, to give over to the federal government the powers originally reserved to the states. When the Congress is arrested by the Supreme Court in its attempted invasion of state concerns, the process of constitutional amendment is immediately invoked by propagandists for the proposed measure. This tendency, if tried over a series of years, would destroy the doctrine of the reserved powers, place the citizen under direct control of his ordinary affairs from Washington, as is the case in France, and would reduce the states from their present autonomous condition to administrative units in a highly centralized commonwealth. The state and local units would synchronize more harmoniously with the Washington bureaucracy, but it would mean the death-knell of one of our most cherished institutions — local self-government. John Fiske has put the proposition aptly in the following words:

> If the time should ever arise (which God forbid) when the people of the different parts of our country should allow their local affairs to be administered by prefects sent from Washington, and when the self-government of the states shall have been so far lost as one of the Departments of France, or even so far as that of the Counties of England; on that day the progressive, political career of the American people will have come to an end, and the hopes that have been built up for the future happiness and prosperity of mankind will be wrecked forever.

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CHAPTER XXXIX

AMERICAN INTERNATIONAL IDEALS

A consideration of the foreign policy of the United States involves our historical rôle and the position we occupy in the affairs of the world today. The impartial seeker of truth must examine the facts of yesterday and must be willing to consider the facts of today. The intelligent and informed student of national and world political situations will realize that the policies of the past cannot prevail without certain modification or mutation, and that contemporary events are not altogether uninfluenced by that which has gone before. Many people entertain the view that the United States, down to recent times, has had little part in shaping world policies, and that we have, in acting independently, had little influence in that society called the family of nations, governed by rules known as international law. Such a conclusion is entirely erroneous. The United States has often led in the promulgation and application of humane and liberal measures and principles which have grown out of our foreign relations and out of our application of international law. These principles and policies were dictated by a profound sympathy for new states attempting to break away from the old order of things and to set up new institutions based on liberal constitutions of government and international good will. They embrace the principles of non-intervention, of neutrality, of the *de facto* recognition of states, of the legal equality of states, of Pan-Americanism, of international arbitration, of the "Open Door," of world peace, and of democracy in foreign relations.

I. The principle of non-intervention.

The motive which inspired the Declaration of Independence was the desire for freedom from foreign political and commercial control, and for individual freedom. It was declared that life, liberty, and the pursuit of happiness were the "inalienable rights" of individual men. As these rights were to

be guaranteed to men as individuals, so could they be claimed for states as independent units in the society of nations. The principles which gave to our early statesmen the inspiration of domestic policy soon found expression in our foreign relations. The most fundamental one was that of "non-intervention."

The matter of geographical isolation had much to do with our independent condition, and the resulting policy of non-intervention. Edmund Burke made much of the physical separation of England and the Colonies in his plea for conciliation. Physical separation from the mother country prevented the colonists from securing equal rights with English citizens. It also gave England every advantage to stifle the Colonies commercially, and to control the seas so far as colonial trade was concerned. The disadvantages of physical separation under political union demonstrated clearly the manifold advantages of both physical and political separation. The idea was given more practical significance in the Revolutionary war, when the Americans saw how difficult it was for a power of Europe to conduct a successful war in America because the base of operations was so far removed from the territory of the European belligerent. The detached physical and constitutional position, therefore, furnished a logical example for a detached international position.

The policy was also influenced by the American form of government. The British monarchy with its absolutism, and royal prerogative, resulting in the deprivation to the colonists of their constitutional rights as Englishmen, and their natural rights as men, rested upon foundations best explained by Thomas Hobbes, who declared that men had through the social contract consented to the establishment of an all-powerful sovereign, who made the laws, but was not himself bound by them. Moreover, the sovereign power, once conferred, could not be withdrawn. Unable to secure their rights as Englishmen, the colonists then turned to the theory of natural rights and to the right of revolution. Wars to preserve the balance of power had largely originated in the design to save or enhance the position of reigning monarchies. The establishment of a republican government with no royal house, based on consent, limited in its powers, and designed to protect the rights of men, would eliminate such dynastic wars as had been the curse of Europe. To have followed the British example

and the view of Hobbes would have led either to colonial submission, or to the establishment of an independent monarchy with all its dangers.

The Congress of the United States, while seeking foreign aid in order to win the war, was soon committed to the policy of non-intervention. In 1783, the Congress, while approving the liberal principles of the armed neutrality, declared that its desire not to complicate the interests of the United States in the affairs of Europe, required the withdrawal of its official support, virtually pledged in 1780. It was finally resolved:

> That the ministers plenipotentiary of these United States for negotiating a peace be, and they are hereby, instructed, in case they should comprise in the definitive treaty any stipulations amounting to a recognition of the rights of neutral nations, to avoid accompanying them by any engagements which shall oblige the contracting parties to support those stipulations by arms.

The principle of non-intervention had the support of two of our leading statesmen, John Adams and George Washington. John Adams, as a negotiator of the treaty of peace establishing our independence, disclosed his position in no mistakable terms to Mr. Richard Oswald, the British negotiator. He declared that he was afraid the United States would be made the tool of the European powers, and of their manouvering to get the United States into their real or imaginary balances of power. "I thought," he said, "it our interest and duty to avoid them (French and English wars) as much as possible and to be completely independent, and to have nothing to do but in commerce with either of them; that my thoughts had been from the beginning to arrange all our European connections to this end, and that they would be continued to be so employed."

The counsel of President Washington set forth in his Farewell Address of September 17, 1796, has greatly influenced American foreign policy. He warned the American people against favoritism toward or hatred of any particular nation. Favoritism could lead easily to an imaginary common interest, where no interest really existed, and would lead to concessions to the favored nations which would be regarded as grounds for resentment by the others. His position was expressed in the following memorable words:

> The great rule of conduct for us in regard to foreign relations is, in extending our commercial relations to have with them as little

political connection as possible. So far as we have already formed engagements let them be fulfilled with perfect good faith. Here let us stop. Europe has a set of primary interests which to us have none or a very remote relation. Hence she must be engaged in frequent controversies, the causes of which are essentially foreign to our concerns.

Hence, therefore, it must be unwise to us to implicate ourselves by artificial ties in the ordinary vicissitudes of her politics or the ordinary combinations and collisions of her friendships or enmities. . . . Why forego the advantages of such a peculiar situation? Why quit our own to stand on foreign ground? Why, by interweaving our destiny with that of any part of Europe, entangle our peace and prosperity in the toils of European ambition, rivalship, interest, humor, or caprice?

The recognition by the United States of the new governments in Latin America raised the question of the attitude of Europe toward them, and of our policy in regard to that attitude. Their independence was an advantage to us, but also a responsibility. Our interests required that they be protected against European aggression. The powers of Europe, after defeating Napoleon and reconstructing the European political system, sought to put down revolutions, to preserve the rights of succession, and to defend the principle of legitimacy, even in America, whose example and influence could not be disregarded. Such purposes were set forth in the Holy Alliance, an agreement between the sovereigns of the autocratic states of Austria, Russia, and Prussia. Great Britain, satisfied with the defeat of Napoleon, and not fearing revolutions which did not interfere with monarchy in England, withdrew from the existing European concert of powers. She turned to the United States, asking us to join her in a declaration pledging both powers against any acquisition of the new states, and discouraging the acquisition of them by any other power. Jefferson and Madison, then retired from public life, favored the joint declaration. So did President Monroe. John Quincy Adams, then Secretary of State, held out for a single declaration, contending that American and British interests were not identical, and that a joint declaration would give Great Britain a substantial pledge against us, while a refusal would leave the United States free to act as emergencies arose. The views of Adams prevailed, after much discussion, and on December 2, 1823, the application of the non-intervention principle was extended to the states of the new world in the

form popularly known as the Monroe Doctrine. President Monroe declared that American policy was averse to engaging in any European wars, in matters relating to themselves, and only the invasion or menacing of our rights could secure our participation in a European struggle. In regard to any movements in the western hemisphere, the policy was reversed. The political systems of the two continents were different, based upon a difference in government, and rights already gained would be scrupulously defended. Existing European dependencies in the New World would be respected, but any intervention to oppress or in any way to control the new governments would meet the opposition of the United States. The conditions of peace with Europe were: (1) Non-intervention in European affairs as regards the United States, and (2) non-intervention in American affairs, either to introduce foreign systems of government or to control the internal affairs of the new states, by the powers of Europe. This included the non-colonization principle, which forbade the powers of Europe to acquire any further territory in the New World.

The United States has at times been called upon to maintain the principle of non-intervention. The most celebrated case was that of the Venezuela boundary dispute of 1895. Great Britain supported the claims of British Guiana to certain territory, also claimed by Venezuela. In defending Venezuelan interests, and asserting the Monroe Doctrine as governing the case, Secretary of State Olney declared: "Today the United States is practically sovereign on this continent, and its fiat is law upon the subjects to which it confines its interposition." This imperialistic utterance was denied by Great Britain. Later, the dispute was referred by both parties to the Permanent Court of Arbitration at The Hague.

The United States has intervened in some of the Latin-American states for the purpose of collecting the customs revenues, and to effect basic reforms in their fiscal systems. The refusal of these states to adjust the claims of foreign creditors led to the threat of intervention by other powers. No course except intervention remained for the United States, if the Monroe Doctrine was to be maintained. We have conventional arrangements with Santo Domingo and Nicaragua, under which we collect their customs revenues and apply a percentage of it to the foreign and domestic debt of the gov-

ernments. In Haiti, the right to intervene for the preservation of order is guaranteed under the treaty. The same protection is afforded Santo Domingo, but only the collection of customs is agreed to by treaty. We may by treaty intervene in Cuba to suppress insurrections and to repel invasions. Panama has allowed the United States sufficient control to operate and defend the canal. The policies of the United States in these states is not free from the charge of imperialism, but in no case has the United States urged or agreed to their annexation. It is an international, and not a constitutional relation.

The United States departed from its policy of non-intervention in 1917 when it entered the World War. Our neutral rights had been violated. Such a course was predicted by President Monroe in his message of 1823, in case our rights should be menaced. Upon the conclusion of the treaty of peace at Versailles in 1919, the League of Nations covenant was made an integral part of the treaty. After a heated campaign in the United States, the Senate refused its advice and consent to the treaty without certain reservations which related to the covenant of the League. Mr. Wilson opposed these reservations, and the treaty was not ratified. The fear of a departure from our leading foreign policy influenced the United States to follow a policy of abundant caution.

Since the Great War, the United States has given a measure of unofficial and non-political coöperation in European affairs, and in certain matters which pertain to the League of Nations. But we have steadily refused to commit ourselves to any policy in advance. Secretary of State Hughes set forth in 1923 the following statement of American policies toward Europe: opposition to alliances generally; an aloofness from the affairs of Europe; the prevention of discrimination against American citizens; the "open door" in mandated areas; cooperation in the judicial settlement of disputes involving justiciable questions; humanitarian coöperation; coöperation in conferences which promise to set up machinery for the adjustment of differences and the formulation of useful conventions; coöperation in economic rehabilitation; and non-interference by Europe in American affairs. The Monroe Doctrine thus remains our most distinguished policy. While not unappreciative of the value of collective international effort, we prefer to await the contingency, and to take such action as our interests will at the time require.

II. Neutrality.

Closely allied to the non-intervention principle is the neutrality policy of the United States. It was based on an advanced conception of neutral duty as regards belligerents. The French Revolution broke out in 1789. The theories of Locke and Rousseau had a deep effect in France and America. Celebrations were held, the term "Citizen" was widely used, and it was the opinion of Jefferson, then Secretary of State, that it would be difficult "to repress the spirit of the people within the limits of a fair neutrality." Further, the United States had to decide upon its course of action under the treaty of alliance with France of 1778. Intervention on the side of France in the war which had embroiled the states of Europe was regarded by some as our duty under the treaty. President Washington, anticipating the situation, asked his Cabinet members to advise him whether or not a proclamation of neutrality should be issued; whether a minister should be received from the republic of France, and if so, whether with qualifications; and whether the treaties with France applied to the present situation. He also asked if the treaties could be regarded as renounced or suspended until the Republic had been more definitely established. It was agreed that a proclamation of neutrality should be issued, and that the minister should be received. After considerable argument between Hamilton and Jefferson, both members of the Cabinet, it was determined that the minister should be received without qualifications, and that the treaties should be regarded as continuing, but not as applying to the present situation. To do otherwise, it was decided, would lead France to regard it as a discrimination in favor of her enemies, which at the time she was resisting with success. Edmond C. Genêt was sent to the United States as French minister. He issued military commissions before presenting his credentials to the President, and in other ways violated our neutrality, under the impression that the United States was the ally of France. Jefferson maintained our neutrality under difficult circumstances, which led to the recall of Genêt. In order more effectively to establish our position as a neutral in the conflict, the Jay treaty of 1794 was concluded with Great Britain, which set at rest the hope entertained by some to involve the United States in the war on the side of France.

The United States, in addition to its policy of an inflexible

neutrality, was concerned with the protection of its commercial and neutral rights, especially on the high seas. The French decrees and the British orders in council threatened the very existence of neutral commerce as well as the sanctity of neutral rights. The problem of the extent to which belligerents may prey upon neutral commerce was at the bottom of this question. Repeated violations led to a limited war with France in 1798. The unwarranted search of American vessels and the detention of American naturalized citizens on the high seas led to the War of 1812.

Our policy has been to issue proclamations of neutrality at the beginning of conflicts between states friendly to the United States. The proclamation of Washington in 1793 set the pace. The so-called neutrality laws of the United States represent the most advanced conception of neutral duty. Unneutral conduct, such as the fitting out of expeditions, the issuing of commissions, and the use of our shores as a base for hostile operations against a state with which the United States is at peace, is made a criminal act. The mere enactment of law has been followed by the practice of preventing, so far as possible, its violation. Examples of a rigid adherence to our neutrality, with certain exceptions which the United States was powerless to prevent, occurred during the French Revolutionary and Napoleonic wars, the struggle between Spain and her colonies, and the earlier years of the Great War.

The Great War found the United States in a most difficult position, both as regards the maintenance of its neutrality, and the enforcement of its neutral rights. As the conflict grew, the difficulties of neutral maritime nations increased. Great Britain extended the limits of blockade to cover any waters furnishing an approach to Germany. The contraband lists were extended until the distinctions sanctioned under international law were completely broken down. Germany finally entered upon an unrestricted submarine warfare, without observing the usual requirement of visit and search. The loss of life due to the submarine campaign led the United States to forsake its neutral condition, and to enter the war on the side of the allied powers.

III. The policy of *de facto* recognition.

A third cardinal principle of foreign policy is the *de facto* policy of recognition. This means that the United States will

recognize the *de facto* or actual government as the *de jure* or lawful one, without inquiring into the constitutional or legal status of the governments seeking recognition. The first application of this principle was made simultaneously with those of non-intervention and neutrality, and involved the reception of Genêt and the recognition of the new French Republic. Jefferson argued that the French treaties of 1778 were between the United States and France, and not between the United States and Louis Capet. Both states had since changed their forms of government, but such an act did not annul treaties, nor did it affect the matter of diplomatic representation. Moreover, he pointed out to Washington that the French Republic existed as a fact, and that it was not the prerogative of the United States to pass judgment on its constitutional character. From this time dated the policy of *de facto* recognition.

The revolt of the Latin-American colonies raised the question of their recognition. It was in effect a reaction against the Napoleonic régime. The sympathy of the United States was enlisted, but this country desired to avoid the charge of premature recognition. The new states, following the example of the United States, sought aid and recognition abroad, and especially from the United States. President Monroe, faced with the question, sought the advice of the Cabinet on four propositions: (1) Can the executive recognize the independence of new states, whose independence is not recognized by the parent state, and with a war going on between them on that account? (2) Is sending a minister to such a country an act of recognition? (3) Would such an acknowledgment be a just cause for war to the parent state? A just cause of complaint for any state? (4) Is it expedient to recognize any South American country now in revolt? No decision was made on these points, but the activities of Henry Clay in favor of recognition, and the continued unofficial representations of these states required a decision. In 1822, after the power of Spain to repossess them had definitely failed, Monroe recognized such states as had established their independence, and a minister was sent to them.

Henry Clay also urged the recognition of Texas, against the will of the executive. Jackson, usually independent in matters of domestic concern, was conservative in foreign policy, and regarded the recognition power as belonging to the body having

the power to declare war. In 1837, Congress appropriated money for the salary of a diplomatic agent to Texas.

After the secession of the Southern states, the United States sought to prevent the recognition of the belligerent status of the seceded states by the powers of Europe. Mr. Seward protested against any official intercourse with them, arguing that the rebellion was purely a domestic concern of the United States, and that the action of the South was illegal. The Southern states merely argued their *de facto* existence, and rested their case. The European states took the position that the President had, through the blockade of the Southern states, employed belligerent measures against them, and had himself accorded them the position of belligerents. It was necessary for maritime nations to define their relation to the conflict for their own protection, and accordingly proclamations of neutrality were issued.

The recognition policy of the United States entered upon a rather distinct phase under the administrations of President Wilson. He issued a statement to the Latin-American diplomatic representatives accredited to Washington declaring that he had no patience with pretending governments, and that "constitutional" governments only would be recognized. He declared that the Huerta government was based on assassination, and would never be recognized by the United States. In time Mr. Wilson, through political pressure, forced Huerta from power. Later the Carranza government was recognized, but order was not restored, nor were American interests protected. The Obregon government was recognized by President Harding, after treaties had been informally agreed to, providing for the adjustment of American claims against Mexico growing out of the revolution, and Mexican claims growing out of the Vera Cruz and Pershing expeditions. In a revolution led by de la Huerta against Obregon, the Harding administration permitted the use of American territory by the Mexican troops, and allowed the purchase of fire-arms from the United States only by Mexican government forces.

At the Central American Conference, held in Washington in 1923, the five states agreed to regard as a menace to peace any effort to alter the constitutional organization of any of them, whether proceeding from a public power, or from private citizens. Consequently, no government would be recognized by any of them coming into power through a coup d'état or

revolution against a recognized government, so long as the constituted representatives had not altered constitutional arrangements. Moreover, no one would be recognized as President, Vice President or Chief of State if he was a leader or related to the leaders of the revolution, or if he had been a high military or administrative official during the revolution. Nor would anyone be recognized as President of any state when ineligible under the constitution and law of that state. This position has been championed by the United States in recent representations to Honduras. The American policy of recognition has therefore changed as regards these states. Non-recognition of revolutionary and unconstitutional governments will probably prevent revolutions, but it makes neighboring states the judges of constitutionality and fitness to rule, a proposition entirely opposed to the *de facto* principle as first applied.

IV. The legal equality of states.

Chief Justice Marshall declared in the case of the *Antelope* that "No principle is more universal than the perfect equality of nations. Russia and Geneva have equal rights." International law has no more fundamental principle, and it has come to be the policy of the United States in its relation to all states, great and small. Such rights belong to all states alike, as certain rights belong to all individuals alike. It is contended by some that there is no such thing as equality between individuals, and that this is less true as between states. It is to be observed that arrangements for peace exist more for the small states than for the large, and that small states have in the main enjoyed a substantial respect for their rights. While some large states have violated the rights of small states, it is also true that other large states have always defended their rights against the aggressor state.

It is claimed that the policy of the United States in the area of the Caribbean sea and in Latin America generally has been in violation of the spirit and letter of this principle. Our interventions there have been, not to interfere with or to suppress independence, but to continue it. Otherwise, they would have disappeared long since as independent states. The United States intervened in Cuba to end an intolerable situation, and renounced our rights to Cuba under title by conquest, by erecting Cuba into an independent state, whose

international existence we guarantee under a treaty mutually satisfactory to Cuba and to ourselves. If the discouragement or suppression of independence had been our aim, ample opportunity to do so has passed unredeemed.

This principle refers to equality before the law, as there can be no such thing as equality of resources, power, or influence, either among states or among individuals.

V. Pan Americanism.

Pan Americanism may be defined as a community of sentiment existing between the states of the New World having for its purpose closer coöperation commercially, culturally and, to a more limited extent, politically. The first Pan American conference met at Panama in 1826. The delegates of the United States arrived too late for the proceedings, but they were expressly limited in their powers under their instructions. Other conferences met in the following order: at Washington in 1889; at Mexico City in 1902; at Rio de Janeiro in 1906; at Buenos Aires in 1910; and at Santiago in 1923. The last conference — the fifth — rejected projects for disarmament and a court of justice, but agreed to the reference of disputes to fact-finding commissions for investigation and report. The United States refused to agree to a plan which would make the Monroe Doctrine a Pan American rather than an American policy.

Professor James Byrne Lockey, a foremost authority on Pan Americanism, has declared that Pan Americanism rests upon these foundations: independence, meaning that these states form independent units in an American state system; representative government, in that each began with the common ideal of popular sovereignty and representative institutions; territorial integrity, leaving each state in the permanent possession of its public domain; law instead of force, which prevents a balance of power and the inevitable conquest of the weaker by the stronger; non-intervention, which has assured comparative peace and freedom from European interference; equality, which respects the rights of all states, large and small; and coöperation for the common interests of all. An agency for coöperation is the Pan American Union, located at Washington, D. C. It has developed the Pan American spirit in a remarkable way. The Secretary of State of the United States is chairman of the governing board,

and the diplomatic representatives of the governments of the western hemisphere accredited to Washington constitute its membership.

Secretary of State Charles E. Hughes made the following statement in regard to Pan Americanism on January 20, 1925:

> Pan American coöperation rests upon the conviction that there are primary and mutual interests which are peculiar to the republics of this hemisphere and that these can best be conserved by taking counsel together and by devising appropriate means of collaboration. . . . The essential basis of Pan American coöperation is peace, and hence we lose no opportunity to promote the amicable settlement of all differences that could be the cause of strife.

VI. International arbitration.

It has been on the whole the consistent policy of the United States to submit to arbitration disputes with foreign powers which do not involve questions of national honor, and which lend themselves to settlement by judicial process. The Jay treaty of 1794 provided for the first arbitrations to which the United States was a party. Three commissions were authorized to determine the river St. Croix, which formed a boundary line between the United States and Great Britain under the treaty of peace; to determine the amount of the debts owed by Americans to the British before the war broke out; and to estimate the losses sustained by British and American merchants due to illegal seizures. This was only the beginning of a long series of such arbitrations by the United States, most of which have been with Great Britain and the states of Latin America. Outstanding arbitrations to which the United States has been a party are: the fur seal arbitration, the North Atlantic fisheries case, and the "Alabama" claims case, all with Great Britain; the Pious Fund of the Californias, with Mexico; and the question of the seizure of neutral ships during war, between the United States and Norway.

The United States was represented at the Hague Conferences of 1899 and 1907. The leading result of these conferences was the conclusion of a convention for the settlement of international disputes, which established a Permanent Court of Arbitration, to which all states, whether signatory powers or not, could repair for the settlement of their international disputes through the mediation of friendly powers, through

an impartial investigation of facts, or through recourse to process of arbitration, under which each power agrees to carry out the award of the arbitrator. The position of the American delegates was in advance of the instructions of the European delegates. The large use made of this court by the United States is evidence of our good faith.

The Permanent Court of International Justice is a tribunal organized under the authority of the League of Nations. Its jurisdiction is not obligatory, but states may sign an optional clause agreeing to the compulsory arbitration of certain classes of legal disputes. On January 27, 1926, the Senate of the United States resolved to adhere to the Protocol of Signature of the World Court, provided that such adherence involve no legal relations with the League of Nations; that the United States might have a share on a basis of equality in the election of the judges; that the American Congress should determine the expenses to be defrayed by the United States; that the statute for the Court should not be amended without American consent; that advisory opinions should not be rendered except publicly after notice to all adhering and interested states; and that no advisory opinion, touching any dispute in which the United States has or claims an interest, could be requested without the consent of the United States. The Conference of the Signatory Powers met at Geneva in September, 1926, to consider the American reservations. All provisos but the one relating to advisory opinions were accepted in principle. The powers did not feel that the United States should have a right to prevent the rendering of advisory opinions based on a mere claim of which she should be the judge. The reservation was accepted on condition that the United States would agree to an interpretation fixing its position as an equal. The President has refused to request the Senate to modify its position, and the adherence of the United States is still a political question.

VII. The "open door."

The policy of the open door has been applied since our earliest relations with the nations of the Far East, in order to secure the same commercial advantages enjoyed by the citizens of European countries. The unfortunate consequences of favoritism toward foreign nations, mentioned in Washington's

Farewell Address, is exemplified in China in a striking way. Nations from the first began to demand special privileges in the form of foreign customs control, extraterritorial jurisdiction, and trade concessions. This practice forced the United States to seek from China and from the states of Europe the treatment of the most favored nation in matters of commerce and the status of nationals. In time, the demands of the powers extended to spheres of interest or influence in the form of virtually perpetual leases. These spheres were said to be for commercial exploitation only, but the course of events led to the assertion of rights of sovereignty, and the dismemberment of China was threatened. John Hay, as Secretary of State, asked the powers of Europe to join the United States in a declaration pledging the open door in all commercial relations with China, and disclaiming any intent to dismember the state. The states gave their approval, but the parcelling continued.

After the World War, a conference on Armaments and Far Eastern questions was called at Washington. The powers party to the treaties which grew out of the deliberations agreed to respect the territorial and administrative integrity of China, and the policy of the open door. The question of extra-territoriality has been investigated by a commission, which has reported on the conditions of its abolition. Agreements were made for the withdrawal by certain powers from Chinese territory occupied by them. Moreover, agreements were made providing for the prevention of war in the Pacific region, and the Anglo-Japanese alliance came to an end. The American policy of equal commercial treatment was formally agreed to by the powers mostly interested in the Far East.

At the conference on Near Eastern affairs at Lausanne, the unofficial American delegate urged the application of the policy of the open door to the territories and waters in and about the Straits, to Turkish territories generally, and especially to those under mandate to foreign powers. Our treaty with Turkey, recently rejected by the Senate, embodied this ideal. In November, 1923, the Secretary of State declared American policy in the Far East to be: (1) The open door; (2) the maintenance of the integrity of China; (3) coöperation and participation in this region with other powers; and (4) the limitation of naval fortifications and bases under express agreement.

VIII. World peace.

The United States was for a long time neither a colonizing nor a sea power, and therefore has lacked the two leading sources of strife and misunderstanding, namely, a desire to control the so-called backward peoples of the world and their territories, and a desire to control the seas. From the first the people were impatient with large standing armies, and the army has been, in time of peace, limited to a nominal strength. This tendency toward peace is shown in our constitutional arrangements which provide for civil control of military policy. With the President as commander-in-chief of our military forces, and with the power to declare war lodged in the Congress, the makers of the Constitution fixed for all time the control of the military departments by the civil authorities.

The United States has at different times proposed the limitation of naval armament by positive agreement between the naval powers. The first agreement was between the United States and Great Britain. Under the Rush-Bagot agreement of 1817, all vessels of both powers were dismantled on the Great Lakes, with the exception of one for police purposes. The Washington Conference on the Limitation of Armament resulted in engagements of this sort. The five-power limitation of naval armament treaty provided for a pro-rata reduction and limitation in the British, French, Japanese, American, and Italian navies. During a ten-year naval holiday ships may be built for replacement purposes only. Under an agreement between the United States, Great Britain and Japan, naval bases and fortifications in the Pacific islands were to be discontinued. Provision is made for the suspension of the treaty obligations, if a party becomes involved in a war which affects its naval strength necessary for its national security. An additional treaty provided for the outlawry of the submarine as an instrument of modern warfare, unless the usual belligerent rights of visit and search are exercised. Moreover, poisonous gases and chemicals were outlawed in modern warfare. A conference on the limitation of naval armament met at Geneva in 1927 at the suggestion of President Coolidge. Japan, Great Britain, and the United States — the major naval powers — sent plenipotentiaries. The United States insisted that all augmentation or reduction should be on a basis of absolute parity, in keeping with the principles of the Washington treaty. Great Britain demanded the right

to increase her armaments within a certain class of warships on an unequal basis. She grounded her claim on the special needs and the peculiar geographical position of the Empire. Japan attempted the rôle of mediator without success. The race in naval armament seems to have been resumed.

The policy of peace has been distinguished by the efforts of our leading statesmen. Theodore Roosevelt, regarded by some as our most bellicose president, was given chiefly to the work of arriving at peaceful solutions of international problems. He intervened directly in the Russo-Japanese war — not alone in the Far Eastern phases but in the European phases as well. This intervention not only led to the Conference of Portsmouth, but to the success of the negotiations and to the formulation of the basic terms. He appealed to the sovereigns of the states over the heads of the commissioners authorized to sign a peace. In the entire proceedings Mr. Roosevelt ignored the usual channels of diplomacy, including the channels of his own country, and used such means as suited his purposes. He also intervened, together with President Diaz, in the Central American conflicts of 1906 and 1907. A conference on Central American affairs met at Washington in 1907, which brought the general war to an end, and established a general treaty of arbitration for the signatory powers, and a Central American Court of Justice.

William Jennings Bryan, always an advocate of world peace, sought as Secretary of State to give his ideas a practical application. A series of treaties, negotiated with all the leading powers of Europe except Germany, provide for a waiting period of one year before the parties will resort to war. During that period any other means of settlement may be tried. It may be by direct negotiation, by the mediation of friendly powers, by the arbitration of a special or general tribunal; or the causes for war, after examination, may disappear. They are not treaties of unlimited arbitration, as Mr. Roosevelt called them, but merely provide for one year in which to try methods short of war, one of which may be arbitration. A waiting period for investigation is a necessary part of every peaceful process. The leading defect of these treaties lies in the fact that they do not take care of what may be called a continuing injury. Repeated instances of the same general complaint might have the effect of unduly postponing the period for negotiations when just cause for war exists.

President Wilson felt it his duty to try to do several conflicting things. He tried to keep his people neutral, both officially and mentally; he sought to prevent the violations of our neutrality on our shores and within our territorial waters; he tried to maintain our neutral rights on the high seas as against both combinations of belligerents; and he desired to lead in a peace movement which would, according to his own declaration, be a "peace without victory." He tried faithfully to keep the United States out of the European war. This policy was approved by the people in the elections of 1916. His position as an impartial peace-maker was completely jeopardized by the belligerent status assumed by the United States in April, 1917, under his leadership. What he failed to achieve as neutral he sought to gain as an active participant in the conflict. He became the active spokesman of the allies, and declared to the world the allied aims and the terms of peace. He conducted the negotiations with the imperial German government which led to its downfall and to the armistice terms. He formulated the famous fourteen points which were accepted by Germany as a basis for peace. At the peace conference he was responsible in the main for the covenant of the League of Nations, the system of mandates, and the provisions relating to minorities and the protection of the small states. His entire philosophy revolved about the principle of self-determination and of an ordered world through international agreement and organization. His aims were necessarily modified by the fact that he was, after all, an ally of a number of conquerors, and only one of them, although the most powerful. The campaign in the United States is known to every one. If he failed in the United States, he succeeded in establishing an international organization in the region where wars are most prolific and where the work is most needed — in Europe.

The United States has in recent years coöperated in an unofficial character for the settlement of non-political questions. It is our present policy to support movements toward peace through independent action, and to deal with the situation as it arises, without pledging action in advance of the contingency.

IX. Democracy in international relations.

Under the Constitution, the control of foreign relations was removed from the people and from the popular branch of the

legislature, and lodged in the President and Senate. Periodical accountings are demanded in regard to domestic questions as the clear right of the people. Judgment on questions of foreign policy, from their nature, has been reserved. There is an increasing demand however for a more democratic method of declaring war, in order that the people may not be led into unnecessary and undesirable conflicts. Furthermore, treaty negotiation, formerly regarded as more or less of a secret proceeding, has lost this quality due to the demand of the people to be informed of the negotiations at all stages of the proceedings. One of President Wilson's fourteen points embraced the idea of "open covenants openly arrived at." Such a plan would spell the death, not only of secret treaties, but of secret negotiations. The conflicts between the President and the Senate over the control of foreign relations have led to the demand for a more direct and democratic control of the nation's foreign affairs. The democratic tendencies of the country in this regard are illustrated by the liberal clauses of the Treaty of Versailles, chiefly inspired by the American delegation, which include the mandate system, the covenant of the League of Nations, the provisions protecting religious, linguistic and racial minorities and small states, and the clauses relating to labor. The war messages of President Wilson inspired a demand for democratic institutions throughout the world, and for the abandonment of the old diplomacy. As a result, questions of foreign policy are today regarded as important as domestic questions by the people and by political parties.

It should be observed, however, that the substitution of democratic control for the more guarded kind, will not of itself prevent or necessarily decrease wars. The people are often the makers of war, and the constituted war-making authority in this country has been slow to act until certain of popular support. It is possible that a change in control will result only in shifting the grounds of war, i.e., war for causes which the people regard as just. The first business of a democracy, then, in controlling its diplomacy, is to learn the game, both as a science and as an art. A democracy must be willing to examine the justice of its own case, and not to assume the status of a belligerent merely because another state holds to a different point of view. The purpose of democratic control is to reduce, and if possible to prevent, unjust and unnecessary wars. The new method increases rather than

decreases the opportunities for misunderstanding and friction, for larger groups and interests are involved, and motives are interpreted. Under the old system, it was assumed that wars, on the whole, were fought for some special end or to serve some special interest. The advantage of the new diplomacy lies in the assumption that each party seeks justice, and that it also seeks to avoid conflict. Democracies must therefore guard against mistaken ideas as to a just cause for war, and of the application of such ideas to their case.

READING

MOORE. *Principles of American Diplomacy.*
———. *Digest of International Law,* 6 vols.
———. *International Law and Some Current Illusions.*
HYDE. *International Law Chiefly as Interpreted and Applied by the United States,* 2 vols.
BUELL. *The Washington Conference.*
———. *International Relations.*
WEYL. *American World Policies.*
WILSON, WOODROW. *War Messages.*
———. *Addresses Delivered on the Western Tour.*
GOEBEL. *The Recognition Policy of the United States.*
MARTIN. *The Policy of the United States as Regards Intervention.*
LATANE. *From Isolation to Leadership.*
THOMAS. *One Hundred Years of the Monroe Doctrine.*
SCOTT. *The United States of America: A Study in International Organization.*
REINSCH. *Secret Diplomacy.*
HENDRICK (Ed.). *Life and Letters of Walter Hines Page.*

NOTE ON A GENERAL READING LIST

In addition to the reading lists appended to each section, it is important that the student should keep in mind the onward sweep of Constitutional formation and development.

For Part I, the Formation of the American Constitutional System, the student cannot be too familiar with Farrand's three volumes on *The Records of the Federal Convention. The Federalist* should be carefully read by every student of the Constitution. Other important works are: Bancroft, *History of the Constitution,* two volumes; Fiske, *The Critical Period;* Farrand, *The Framing of the Constitution;* and Beard, *The Supreme Court and the Constitution,* and *The Economic Interpretation of the Constitution.*

The debates of the Federal Convention were not officially recorded, as the sessions were secret. Farrand's *Records of the Federal Convention,* three volumes, published by the Yale University Press and Oxford, is the best compilation. The Notes of Madison and Yates, together with many other documents, including the official journal, may be found in the *Documentary History of the Constitution,* five volumes, published by the Department of State. The notes of Yates were published in 1821 under the title *Secret Proceedings and Debates.* Madison's notes were first published in 1840. The best reprint is by Hunt and Scott, *Debates in the Federal Convention of 1787,* published by the Oxford University Press, American Branch.

For Part II, the Development of the American Constitutional System, the student should read the important cases cited in the text, including the following: *Marbury* v. *Madison; Dartmouth College* v. *Woodward; McCulloch* v. *Maryland; Ableman* v. *Booth; Charles River* v. *Warren Bridge, ex parte Merryman; Munn* v. *Illinois; Smyth* v. *Ames,* and *Pollock* v. *Farmers Loan and Trust Company.* For political and legal development, the following books are important: Burgess, *The Middle Period;* Dunning, *Essays in Civil War and Reconstruction;* and Haines, *The American Doctrine of Judicial Supremacy.*

Every student of our system of government should read Horwill's *The Usages of the American Constitution,* published by the Oxford University Press. An Englishman has here presented a view of our Constitution which is gaining ground, both in England and America. Mr. Horwill rejects the usual contrasts between the English and American Constitutions as mistaken ones, and points out the influence of usage on both systems.

For Part III, The Spirit of the American Constitution, Merriam's *American Political Theories* and *American Political Ideas* set forth our political ideals in their historical perspective. *The Spirit of the American Government* by J. Allen Smith is a lucid and critical exposition of the spirit of our political system. The most penetrating analysis in a generation of the foundations and objects of statehood in general, with adequate reference to the provisions of the Preamble to the Constitution, may be found in Holcombe's *Foundations of the Modern Commonwealth.* American institutions and ideals, as institutionalized into fundamental law and political practice are admirably set forth in Bryce's *Modern Democracies,* Volume II. McIlwain's *American Revolution* is the standard work on the political, and more especially the constitutional doctrines of that period. Becker's account of the *Declaration of Independence* should be carefully read by every student of American ideals. The writings and speeches of our leading political thinkers form the basis for the formulation of our political ideals. Opinions vary as to the most influential ones. Certainly any complete list would include the works of James Otis, Patrick Henry, John Adams, John Quincy Adams, Thomas Jefferson, James Madison, James Wilson, Alexander Hamilton, John C. Calhoun, Abraham Lincoln, Theodore Roosevelt, and Woodrow Wilson.

The Supreme Court and the Constitution are dealt with in two recent exhaustive works: Warren, *The Supreme Court in United States History,* three volumes, and Beveridge, *The Life of John Marshall,* four volumes.

Cases on Constitutional Law have been compiled by Thayer, Hall, and Evans.

Evolutionary discussions of the Constitution include Norton, *The Constitution of the United States, its Sources and its Application;* Beck, *The Constitution of the United States;* Burdick, *The Law of the American Constitution;* Willoughby,

The American Constitutional System. For an emphasis on men and ideas rather than mere facts and events, see Elliott, E. G., *Biographical Story of the Constitution.*

Two excellent volumes of a general character on the American government are: Munro, *Government of the United States* (1925), and Beard, *American Government and Politics* (1924).

The decisions of the Supreme Court of the United States are compiled in *The United States Reports.*

For exhaustive citations to the cases of the Supreme Court of the United States construing the several provisions of the Constitution collated under each provision, see *The Constitution of the United States of America as Amended to January 1, 1924* (Annotated), compiled by George Gordon Payne, under the direction of the Committee on Rules of the United States Senate.

For general rules of construction and interpretation of the Constitution of the United States, the student should consult the following leading general cases:

Nature of the Constitution:

McCulloch v. *Maryland,* 4 Wheat. 316.
Barron v. *Baltimore,* 7 Pet. 243.
Twining v. *New Jersey,* 211 U. S. 78.
Slaughterhouse Cases, 16 Wall. 36.
U. S. v. *Cruikshank,* 92 U. S. 542.
Civil Rights Cases, 109 U. S. 3.

The Jurisdiction of the United States:

Gibbons v. *Ogden,* 9 Wheat. 1.
McCulloch v. *Maryland,* 4 Wheat. 316.
Cohens v. *Virginia,* 6 Wheat. 264.
Texas v. *White,* 7 Wall. 700.
U. S. v. *Texas,* 143 U. S. 621.
Tennessee v. *Davis,* 100 U. S. 527.
Logan v. *U. S.,* 144 U. S. 263.
American Insurance Co. v. *Canter,* 1 Pet. 511.
Mormon Church v. *U. S.,* 136 U. S. 1.
Jones v. *U. S.,* 137 U. S. 202.
In re Ross, 140 U. S. 453.
Fong Yue Ting v. *U. S.,* 149 U. S. 698.

Relation of the States to the Federal Government:

Lane County v. *Oregon,* 7 Wall. 71.
Martin v. *Hunter,* 1 Wheat. 304.
Tennessee v. *Davis,* 100 U. S. 257.
Ex parte Siebold, 100 U. S. 371.
In re Neagle, 135 U. S. 1.
Davis v. *Elmira Savings Bank,* 161 U. S. 275.
Collector v. *Day,* 11 Wall. 124.
Worcester v. *Georgia,* 6 Pet. 570.
Chinese Exclusion Case, 130 U. S. 604.

Checks and Balances in Government:

Marbury v. *Madison,* 1 Cranch 137.
Chicago, &c., R. Co. v. *Wellman,* 143 U. S. 339.
Pollock v. *Farmers Loan & Trust Co.,* 158 U. S. 601.
Field v. *Clark,* 143 U. S. 649.

APPENDIX

I

THE MAYFLOWER COMPACT

In y^e^ name of God Amen. We whose names are underwritten, the loyall subjects of our dread Soveraigne Lord King James by y^e^ grace of God, of great Britaine, Franc, & Ireland king, defender of y^e^ faith, &c.

Haveing undertaken, for y^e^ glorie of God, and advancemente of y^e^ christian faith and honour of our king & countrie, a voyage to plant y^e^ first colonie in y^e^ Northene parts of Virginia. Doe by these presents solemnly & mutually in y^e^ presence of God, and one of another, covenant, & combine our selves togeather into a Civill body politick; for our better ordering, and preservation & furtherance of y^e^ ends aforesaid; and by Vertue hearof to enacte, constitute, and frame such just & equall lawes, ordinances, Acts, constitutions, & offices, from time to time, as shall be thought most meete & convenient for y^e^ generall good of y^e^ Colonie: unto which we promise all due submission and obedience. In witnes wherof we have hereunder subscribed our names at Cap-Codd y^e^ .11. of November, in y^e^ year of y^e^ raigne of our soveraigne Lord King James of England, France, & Ireland y^e^ eighteenth and of Scotland y^e^ fiftie fourth. An^o^: Dom. 1620.

II

THE BILL OF RIGHTS

An Act for Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown — 1689.

Whereas, the Lords Spiritual and Temporal, and Commons, assembled at Westminster, lawfully, fully, and freely representing all the Estates of the people of this Realm, did upon the 13th day of February, in the year of our Lord One Thousand Six Hundred and Eighty-eight (o.s.), present unto their Majesties, then called and known by the names and style of William and Mary, Prince and Princess of Orange, being present in their proper persons, a certain declaration in writing, made by the said Lords and Commons, in the words following, viz.:

" Whereas the late King James II, by the assistance of divers evil councellors, judges, and ministers employed by him, did endeavor to subvert and extirpate the Protestant religion, and the laws and liberties of this Kingdom;

1. By assuming and exercising a power of dispensing with and suspending of laws, and the execution of laws, without consent of Parliament.

2. By committing and prosecuting divers worthy Prelates for humbly petitioning to be excused from concurring to the said assumed power.

3. By issuing and causing to be executed a commission under the Great Seal for erecting a court, called the Court of Commissioners for Ecclesiastical Causes.

4. By levying money for and to the use of the Crown by pretense of prerogative for other time and in other manner than the same was granted by Parliament.

5. By raising and keeping a standing army within this kingdom in time of peace, without consent of Parliament, and quartering soldiers contrary to law.

6. By causing several good subjects, being Protestants, to be disarmed, at the same time when Papists were both armed and employed contrary to law.

7. By violating the freedom of election of members to serve in Parliament.

8. By prosecutions in the Court of King's Bench for matters and causes cognisable only in Parliament, and by divers other arbitrary and illegal causes.

9. And whereas of late years, partial, corrupt, and unqualified persons have been returned, and served on juries and trials, and particularly divers jurors in trials for high treason, which were not freeholders.

10. And excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects.

11. And excessive fines have been imposed; and illegal and cruel punishments inflicted.

12. And several grants and promises made of fines and forfeitures before any conviction or judgment against the persons upon whom the same were to be levied.

All which are utterly and directly contrary to the known laws and statutes, and freedom of this realm.

And whereas the late King James II having abdicated the government, and the throne being thereby vacant, His Highness the Prince of Orange (whom it hath pleased Almighty God to make the glorious instrument of delivering this Kingdom from Popery and arbitrary power) did (by the advice of the Lords Spiritual and Temporal and divers principal persons of the Commons) cause letters to be written to the Lords Spiritual and Temporal, being Protestants, and other letters to the several counties, cities, universities, borroughs, and cinque ports, for the choosing of such persons to represent them as were of right to be sent to Parliament, to meet and sit at Westminster upon the two and twentieth day of January, in this Year One Thousand Six Hundred Eighty and Eight, in order to such an establishment as that their religion, laws, and liberties might not again be in danger of being subverted; upon which letters elections have been accordingly made,

And thereupon the said Lords Spiritual and Temporal, and Com-

mons, pursuant to their respective letters and elections, being now assembled in full and free representation of this nation, taking into their most serious consideration the best means for attaining the ends aforesaid, do in the first place (as their ancestors in like case have usually done) for the vindicating, and asserting their ancient rights and liberties, declare:

1. That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of Parliament, is illegal.

2. That the pretended power of dispensing of laws, or the execution of laws by regal authority, as it hath been assumed and exercised of late, is illegal.

3. That the commission for erecting the late Court of Commissioners for Ecclesiastical Causes, and all other commissions and courts of like nature, are illegal and pernicious.

4. That levying money for or to the use of the Crown by pretence and prerogative without grant of Parliament, for longer time or in other manner than the same is or shall be granted is illegal.

5. That it is the right of the subjects to petition the King, and all commitments and prosecutions for such petitioning are illegal.

6. That the raising or keeping a standing army within the kingdom in time of peace, unless it be with the consent of Parliament, is against law.

7. That the subjects which are Protestants may have arms for their defense suitable to their conditions, and as allowed by law.

8. That election of members of Parliament ought to be free.

9. That the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament.

10. That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishment inflicted.

11. That jurors ought to be duly impanelled and returned, and juries which pass upon men in trials for high treason ought to be freeholders.

12. That all grants and promises of fines and forfeitures of particular persons before conviction are illegal and void.

13. And that for redress of all grievances, and for the amending, strengthening, and preserving of the laws, Parliament ought to be held frequently.

And they do claim, demand, and insist upon all and singular the premises, as their undoubted rights and liberties; and that no declarations, judgments, doings or proceedings, to the prejudice of the people in any of the said premises, ought in any wise to be drawn hereafter into consequence or example.

To which demand of their rights they are particularly encouraged by the declaration of His Highness the Prince of Orange, as being the only means for obtaining full redress and remedy therein.

Having therefore entire confidence that his said Highness the Prince of Orange will perfect the deliverance so far advanced by him, and will still preserve them from the violation of their rights,

which they have here asserted, and from all other attempts upon their religion, rights, and liberties:

II. The said Lords Spiritual and Temporal, and Commons, assembled at Westminster do resolve, that William and Mary, Prince and Princess of Orange, be, and be declared, King and Queen of England, France and Ireland, and the dominions thereunto belonging, to hold the crown and the royal dignity of the said kingdoms and dominions to them the said Prince and Princess during their lives, and the life of the survivor of them; and that the sole and full exercise of the regal power be only in, and executed by, the said Prince of Orange in the names of the said Prince and Princess, during their joint lives; and after their deceases, the said crown and royal dignity, of the said kingdoms and dominions to be to the heirs of the body of the said Princess; and for default of such issue to the Princess Anne of Denmark, and the heirs of her body; and for default of such issue to the heirs of the body of said Prince of Orange. And the Lords Spiritual and Temporal, and Commons, do pray the said Prince and Princess to accept the same accordingly.

III. And that the oaths hereafter mentioned be taken of all persons of whom the oaths of allegiance and supremacy might be required by law instead of them; and that the said oath of allegiance and supremacy be abrogated.

'I, A. B., do sincerely promise and swear. That I will be faithful and bear true allegiance to their Majesties King William and Queen Mary:

'So help me God.'

'I, A. B., do swear, That I do from my heart abhor, detest and abjure as impious and heretical that damnable doctrine and position, that princes excommunicated or deprived by the Pope, or any authority of the See of Rome, may be deposed or murdered by their subjects, or any other whatsoever. And I do declare, that no foreign prince, person, prelate, state, or potentate hath, or ought to have, any jurisdiction, power, superiority, preëminence, or authority, ecclesiastical or spiritual, within this realm:

'So help me God.'"

IV. Upon which their said Majesties did accept the crown and royal dignity of the kingdoms of England, France, and Ireland, and the dominions thereunto belonging, according to the resolution and desire of the said Lords and Commons contained in the said declaration.

V. And thereupon their Majesties were pleased, that the said Lords Spiritual and Temporal, and Commons, being the two Houses of Parliament, should continue to sit, and with their Majesties' royal concurrence make effectual provision for the settlement of the religion, laws and liberties of this kingdom, so that the same for the future might not be in danger again of being subverted; to which the said Lords Spiritual and Temporal, and Commons, did agree and proceed to act accordingly.

VI. Now in pursuance of the premises, the said Lords Spiritual and Temporal, and Commons, in Parliament assembled, for the rati-

fying, confirming, and establishing the said declaration, and the articles, clauses, matters, and things therein contained, by the force of a law made in due form by authority of Parliament, do pray that it may be declared and enacted. That all and singular the rights and liberties asserted and claimed in the said declaration are the true, ancient, and indubitable rights and liberties of the people of this kingdom, and so shall be esteemed, allowed, adjudged, deemed, and taken to be, and that all and every the particulars aforesaid shall be firmly and strictly holden and observed, as they are expressed in the said declaration; and all officers and ministers whatsoever shall serve their Majesties and their successors according to the same in all times to come.

VII. And the said Lords Spiritual and Temporal, and Commons, seriously considering how it hath pleased Almighty God, in his marvellous providence, and merciful goodness to this nation, to provide and preserve their said Majesties' royal persons most happily to reign over us upon the throne of their ancestors, for which they render unto Him from the bottom of their hearts their humblest thanks and praises, do truly, firmly, assuredly, and in the sincerity of their hearts, think, and do hereby recognise, acknowledge, and declare, that King James II having abdicated the Government, and their Majesties having accepted the Crown and royal dignity as aforesaid, their said Majesties did become, were, are, and of right ought to be, by the laws of this realm, our sovereign liege Lord and Lady, King and Queen of England, France, and Ireland, and the dominions thereunto belonging; in and to whose princely persons the royal estate, crown, and dignity of the said realms, with all honours, styles, titles, regalities, prerogatives, powers, jurisdictions, and authorities to the same belonging and appertaining, are most fully, rightfully, and entirely invested and incorporated, united, and annexed.

VIII. And for preventing all questions and divisions in this realm, by reason of any pretended titles to the Crown and for preserving a certainty in the succession thereof, in and upon which the unity, peace, tranquillity, and safety of this nation doth, under God, wholly consist and depend, the said Lords Spiritual and Temporal, and Commons, do beseech their Majesties that it may be enacted, established, and declared, that the Crown and regal government of the said kingdoms and dominions, with all and singular the premises thereunto belonging and appertaining, shall be and continue to their said Majesties, and the survivor of them, during their lives, and the life of the survivor of them. And that the entire, perfect, and full exercise of the regal power and government be only in, and executed by, his Majesty, in the names of both their Majesties, during their joint lives; and after their deceases the said Crown and premises shall be and remain to the heirs of the Body of her Majesty; and for default of such issue, to her Royal Highness the Princess Anne of Denmark, and the heirs of her body; and for default of such issue, to the heirs of the body of his said Majesty; and thereunto the said Lords Spiritual and Temporal, and Com-

mons, do, in the name of all the people aforesaid, most humbly and faithfully submit themselves, their heirs and posterities, for ever: and do faithfully promise, that they will stand to, maintain, and defend their said Majesties, and also the limitation and succession of the Crown herein specified and contained, to the utmost of their powers, with their lives and estates, against all persons whatsoever that shall attempt anything to the contrary.

IX. And whereas it hath been found by experience, that it is inconsistent with the safety and welfare of this Protestant kingdom to be governed by a Popish prince, or by any king or queen marrying a Papist, the said Lords Spiritual and Temporal, and Commons, do further pray that it may be enacted, That all and every person and persons that is, are, or shall be reconciled to, or shall hold communion with, the See or Church of Rome, or shall profess the Popish religion, or shall marry a Papist, shall be excluded, and be for ever incapable to inherit, possess, or enjoy the Crown and Government of this realm, and Ireland, and the dominions thereunto belonging, or any part of the same, or to have, use, or exercise, any regal power, authority, or jurisdiction within the same; and in all and every such case or cases the people of these realms shall be and are hereby absolved of their allegiance, and the said Crown and government shall from time to time descend to, and be enjoyed by, such person or persons, being Protestants, as should have inherited and enjoyed the same, in case the said person or persons so reconciled, holding communion, or professing, or marrying, as aforesaid, were naturally dead.

X. And that every King and Queen of this realm, who at any time hereafter shall come to and succeed in the Imperial Crown of this kingdom, shall, on the first day of the meeting of the first Parliament, next after his or her coming to the Crown, sitting in his or her throne in the House of Peers, in the Presence of the Lords and Commons therein assembled, or at his or her coronation, before such person or persons who shall administer the coronation oath to him or her, at the time of his or her taking the said oath (which shall first happen), make, subscribe, and audibly repeat the declaration mentioned in the statute made in the thirteenth year of the reign of King Charles II., intituled "An Act for the more effectual preserving the King's person and Government, by disabling Papists from sitting in either House of Parliament." But if it shall happen that such King or Queen, upon his or her succession to the Crown of this realm, shall be under the age of twelve years, then every such King or Queen shall make, subscribe, and audibly repeat the said declaration at his or her coronation, or the first day of meeting of the first Parliament as aforesaid, which shall first happen after such King or Queen shall have attained the said age of twelve years.

XI. All which their Majesties are contented and pleased shall be declared, enacted, and established by authority of this present Parliament, and shall stand, remain, and be the law of this realm for ever; and the same are by their said Majesties, by and with the

advice and consent of the Lords Spiritual and Temporal, and Commons, in Parliament assembled, and by the authority of the same, declared, enacted, or established accordingly.

XII. And be it further declared and enacted by the authority aforesaid. That from and after this present session of Parliament, no dispensation by non obstante of or to any statute, or any part thereof, shall be allowed, but that the same shall be held void and of no effect, except a dispensation be allowed of in such statute, and except in such cases as shall be specially provided for by one or more bill or bills to be passed during this present session of Parliament.

XIII. Provided that no charter, or grant, or pardon, granted before the three-and-twentieth day of October, in the year of our Lord One thousand six hundred eighty-nine, shall be any ways impeached or invalidated by this Act, but that the same shall be and remain of the same force and effect in law, and no other, than as if this Act had never been made.

III

DECLARATION AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS

14 October 1774

Whereas, since the close of the last war, the British Parliament, claiming a power, of right, to bind the people of America by statutes in all cases whatsoever, hath, in some acts, expressly imposed taxes on them, and in others, under various pretences, but in fact for the purpose of raising a revenue, hath imposed rates and duties payable in these colonies, established a board of commissioners with unconstitutional powers, and extended the jurisdiction of courts of admiralty, not only for collecting the said duties, but for the trial of causes merely arising within the body of a county.

And whereas, in consequence of other statutes, judges who before held only estates at will in their offices, have been made dependent on the Crown alone for their salaries, and standing armies kept in times of peace. And it has lately been resolved in Parliament, that by force of a statute made in the thirty-fifth year of the reign of King Henry the Eighth, colonists may be transported to England, and tried there upon accusations for treasons and misprisions, or concealments of treasons committed in the colonies; and by a late statute, such trials have been directed in cases therein mentioned.

And whereas, in the last session of Parliament, . . . [the Boston Port Act, the Massachusetts Government Act, the Administration of Justice Act, and the Quebec Act were passed]. . . . All which statutes are impolitic, unjust, and cruel, as well as unconstitutional, and most dangerous and destructive of American rights.

And whereas, Assemblies have been frequently dissolved, contrary to the rights of the people, when they attempted to deliberate on grievances; and their dutiful, humble, loyal, and reasonable petitions to the Crown for redress, have been repeatedly treated with contempt, by His Majesty's ministers of State:

The good people of the several colonies of New-Hampshire, Massachusetts-Bay, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Newcastle Kent and Sussex on Delaware, Maryland, Virginia, North-Carolina, and South-Carolina, justly alarmed at these arbitrary proceedings of Parliament and administration, have severally elected, constituted, and appointed deputies to meet, and sit in general Congress, in the city of Philadelphia, in order to obtain such establishments, as that their religion, laws, and liberties, may not be subverted.

Whereupon the deputies so appointed being now assembled, in a full and free representation of these colonies, taking into their most serious consideration the best means of attaining the ends aforesaid, do in the first place, as Englishmen their ancestors in like cases have usually done, for asserting and vindicating their rights and liberties, *declare,*

That the inhabitants of the English Colonies in North America, by the immutable laws of nature, the principles of the English Constitution, and the several charters or compacts, have the following rights:

1. That they are entitled to life, liberty, and property, and they have never ceded to any sovereign power whatever, a right to dispose of either without their consent.

2. That our ancestors, who first settled these colonies, were at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-born subjects within the realm of England.

3. That by such emigration they by no means forfeited, surrendered, or lost any of those rights, but that they were, and their descendants now are entitled to the exercise and enjoyment of all such of them, as their local and other circumstances enable them to exercise and enjoy.

4. That the foundation of English liberty, and of all free government, is a right in the people to participate in their legislative council: and as the English colonists are not represented, and from their local and other circumstances, cannot properly be represented in the British Parliament, they are entitled to a free and exclusive power of legislation in their several provincial legislatures, where their right of representation can alone be preserved, in all cases of taxation and internal polity, subject only to the negative of their sovereign, in such manner as has been heretofore used and accustomed. But, from the necessity of the case, and a regard to the mutual interest of both countries, we cheerfully consent to the operation of such Acts of the British Parliament, as are bona fide restrained to the regulation of our external commerce, for the purpose of securing the commercial advantages of the whole empire to the

mother country, and the commercial benefits of its respective members; excluding every idea of taxation, internal or external, for raising a revenue on the subjects in America without their consent.

5. That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.

6. That they are entitled to the benefit of such of the English statutes, as existed at the time of their colonization; and which they have, by experience, respectively found to be applicable to their several local and other circumstances.

7. That these, His Majesty's Colonies, are likewise entitled to all the immunities and privileges granted and confirmed to them by royal charters, or secured by their several codes of provincial laws.

8. That they have a right peaceably to assemble, consider of their grievances, and petition the king; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal.

9. That the keeping a standing army in these colonies, in times of peace, without the consent of the legislature of that colony in which such army is kept, is against law.

10. It is indispensably necessary to good government, and rendered essential by the English Constitution, that the constituent branches of the legislature be independent of each other; that, therefore, the exercise of legislative power in several colonies, by a council appointed during pleasure, by the Crown, is unconstitutional, dangerous, and destructive to the freedom of American legislation.

All and each of which the aforesaid deputies, in behalf of themselves, and their constituents, do claim, demand, and insist on, as their indubitable rights and liberties; which cannot be legally taken from them, altered or abridged by any power whatever, without their own consent, by their representatives in their several provincial legislatures.

In the course of our inquiry, we find many infringements and violations of the foregoing rights, which, from an ardent desire that harmony and mutual intercourse of affection and interest may be restored, we pass over for the present, and proceed to state such acts and measures as have been adopted since the last war, which demonstrate a system formed to enslave America.

Resolved, That the following Acts of Parliament are infringements and violations of the rights of the colonists; and that the repeal of them is essentially necessary, in order to restore harmony between Great Britain and the American colonies, viz.:

The several Acts of 4 Geo. III, c. 15, 34; 5 Geo. III, c. 25; 6 Geo. III, c. 52; 7 Geo. III, c. 41, 46; 8 Geo. III, c. 22; which impose duties for the purpose of raising a revenue in America, extend the powers of the admiralty courts beyond their ancient limits, deprive the American subject of trial by jury, authorize the judge's certificate to indemnify the prosecutor from damages that he might otherwise be liable to, requiring oppressive security from a claimant

of ships and goods seized before he shall be allowed to defend his property; and are subversive of American rights.

Also the 12 Geo. III, c. 24, 'For the better preserving His Majesty's dockyards, etc.', which declares a new offense in America, and deprives the American subject of a constitutional trial by jury of the vicinage. . . .

Also the three Acts passed in the last session of Parliament, for stopping the port and blocking up the harbour of Boston, for altering the charter and government of the Massachusetts-Bay, and that which is entitled 'An Act for the better administration of Justice'.

Also the Act passed the same session for establishing the Roman Catholick religion in the Province of Quebec, abolishing the equitable system of English laws, and erecting a tyranny there, to the great danger, from so great a dissimilarity of religion, law, and government, of the neighbouring British colonies. . . .

Also the Act passed the same session for the better providing suitable quarters for officers and soldiers in His Majesty's service in North America.

Also, that the keeping a standing army in several of these colonies in time of peace, without the consent of the legislature of that colony in which the army is kept, is against law.

To these grievous Acts and measures Americans cannot submit, but in hopes that their fellow-subjects in Great Britain will, on a revision of them, restore us to that state in which both countries found happiness and prosperity, we have for the present only resolved to pursue the following peaceable measures: (1) To enter into a non-importation, non-consumption, and non-exportation agreement or association. (2) To prepare an Address to the people of Great Britain, and a Memorial to the inhabitants of British America, and (3) To prepare a loyal Address to His Majesty, agreeable to resolutions already entered into.

IV

ARTICLES OF ASSOCIATION OF THE FIRST CONTINENTAL CONGRESS[1]

20 October 1774

We, His Majesty's most loyal subjects, the delegates of the several colonies . . . deputed to represent them in a Continental Congress, . . . to obtain redress of these grievances, which threaten destruction of the lives, liberty, and property of His Majesty's subjects in North America, we are of opinion that a non-importation, non-consumption, and non-exportation agreement, faithfully adhered to, will prove the most speedy, effectual and peaceable measure; and there-

[1] Morison, Sources and Documents illustrating the American Revolution, p. 122.

fore we do, for ourselves, and the inhabitants of the several colonies whom we represent, firmly agree and associate, under the sacred ties of virtue, honour, and love of country, as follows:

1. That from and after the first day of December next, we will not import into British America from Great Britain or Ireland, any goods, wares, or merchandise whatsoever, or from any other place, any such goods, wares, or merchandise, as shall have been exported from Great Britain or Ireland; nor will we after that day import any East-India tea from any part of the world; nor any molasses, syrups, paneles, coffee, or pimento from the British plantations or from Dominica; nor wines from Madeira or the Western Islands; nor foreign indigo

2. We will neither import nor purchase any slave imported after the first day of December next; after which time we will wholly discontinue the slave trade, . . .

3. . . . from this day, we will not purchase or use any tea, imported on account of the East India Company, . . . and after the first day of March next, we will not purchase or use any East India tea whatever; nor will we . . . purchase or use any of those goods, wares, or merchandise we have agreed not to import, . . .

4. The earnest desire we have not to injure our fellow-subjects in Great Britain, Ireland, or the West Indies, induces us to suspend a non-exportation, until the tenth day of September 1775; at which time, if the said Acts and parts of Acts of the British Parliament hereinafter mentioned are not repealed, we will not directly or indirectly export any merchandise or commodity whatsoever to Great Britain, Ireland, or the West Indies, except rice to Europe.

5. [Merchants to send no more orders to Great Britain.

6. Shipowners to order their masters to lade no prohibited goods.]

7. We will use our utmost endeavours to improve the breed of sheep, and increase their numbers to the greatest extent; and to that end, we will kill them as seldom as may be, especially those of the most profitable kind; nor will we export any to the West Indies or elsewhere; and those of us who are or may become overstocked with, or can conveniently spare any sheep, will dispose of them to our neighbours, especially to the poorer sort, on moderate terms.

8. We will, in our several stations, encourage frugality, economy, and industry, and promote agriculture, arts and the manufactures of this country, especially that of wool; and will discountenance and discourage every species of extravagance and dissipation, especially all horse-racing, and all kinds of gaming, cock-fighting, exhibitions of shews, plays, and other expensive diversions and entertainments; and on the death of any relation or friend, none of us, or any of our families, will go into any further mourning-dress, than a black crape or ribbon on the arm or hat, for gentlemen, and a black ribbon and necklace for ladies, and we will discontinue the giving of gloves and scarves at funerals.

9. [Profiteers in stocks on hand will be boycotted.]

10. In case any merchant, trader, or other person, shall import any goods or merchandise, after the first day of December, and before the first day of February next, the same ought forthwith, at the election of the owner, to be either re-shipped or delivered up to the committee of the county or town wherein they shall be imported, to be stored at the risque of the importer until the non-importation agreement shall cease, or be sold under the direction of the committee aforesaid. . . .

11. That a committee be chosen in every county, city, and town, by those who are qualified to vote for representatives in the legislature, whose business it shall be attentively to observe the conduct of all persons touching this association; and when it shall be made to appear, to the satisfaction of a majority of any such committee, that any person within the limits of their appointment has violated this association, that such majority do forthwith cause the truth of the case to be published in the gazette; to the end, that all such foes to the rights of British-America may be publicly known, and universally contemned as the enemies of American liberty; and thenceforth we respectively will break off all dealings with him or her.

12. That the committee of correspondence, in the respective colonies, do frequently inspect the entries of their custom-houses, and inform each other, from time to time, of the true state thereof, and of every other material circumstance that may occur relative to this association.

13. That all manufactures of this country be sold at reasonable prices, so that no undue advantage be taken of a future scarcity of goods.

14. And we do further agree and resolve, that we will have no trade, commerce, dealings or intercourse whatsoever, with any colony or province in North America, which shall not accede to, or which shall hereafter violate this association, but will hold them as unworthy of the rights of freemen, and as inimical to the liberties of their country.

And we do solemnly bind ourselves and our constituents, under the ties aforesaid, to adhere to this Association until [the Acts of Parliament complained of at the end of the Declaration and Resolves above] are repealed. And we recommend it to the provincial conventions and to the committees in the respective colonies to establish such farther regulations as they may think proper, for carrying into execution this association.

PEYTON RANDOLPH, *President.*
[Signed by all the members.]

IN CONGRESS, PHILADELPHIA,
October 20, 1774.

V

THE VIRGINIA BILL OF RIGHTS

12 June 1776

A Declaration of Rights made by the representatives of the good people of Virginia, assembled in full and free Convention; which rights do pertain to them and their posterity, as the basis and foundation of government.

1. That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot by any compact deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

2. That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.

3. That government is, or ought to be instituted for the common benefit, protection, and security of the people, nation, or community; of all the various modes and forms of government, that is best which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration; and that when any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, unalienable and indefeasible right to reform, alter or abolish it, in such manner as shall be judged most conducive to the public weal.

4. That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of publick services; which, not being descendible, neither ought the offices of magistrate, legislator or judge to be hereditary.

5. That the legislative and executive powers of the state should be separate and distinct from the judiciary; and that the members of the two first may be restrained from oppression, by feeling and participating the burthens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain, and regular elections, in which all, or any part of the former members to be again eligible or ineligible, as the laws shall direct.

6. That elections of members to serve as representatives of the people in assembly, ought to be free; and that all men having sufficient evidence of permanent common interest with, and attachment to the community, have the right of suffrage, and cannot be taxed or deprived of their property for publick uses, without their own consent, or that of their representatives so elected, nor bound by any law to which they have not, in like manner, assented for the public good.

7. That all power of suspending laws, or the execution of laws, by any authority without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised.

8. That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favour and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty; nor can he be compelled to give evidence against himself; that no man be deprived of his liberty, except by the law of the land or the judgment of his peers.

9. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

10. That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.

11. That in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other, and ought to be held sacred.

12. That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotick governments.

13. That a well-regulated militia, composed of the body of the people trained to arms, is the proper, natural and safe defence of a free state; that standing armies in time of peace should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power.

14. That the people have a right to uniform government; and, therefore, that no government separate from, or independent of the government of Virginia, ought to be erected or established within the limits thereof.

15. That no free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles.

16. That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love, and charity towards each other.

VI

THE DECLARATION OF INDEPENDENCE

In Congress, July 4, 1776

A DECLARATION BY THE REPRESENTATIVES OF THE UNITED STATES OF AMERICA, IN CONGRESS ASSEMBLED.

When, in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another and to assume, among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident: That all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness. That, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that, whenever any form of government becomes destructive of these ends it is the right of the people to alter or to abolish it, and to institute a new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness. Prudence, indeed, will dictate, that governments long established should not be changed for light and transient causes and accordingly all experience hath shown that mankind are more disposed to suffer while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government, and to provide new guards for their future security. Such has been the patient sufferance of these colonies; and such is now the necessity which constrains them to alter their former systems of government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these states. To prove this, let facts be submitted to a candid world.

He has refused his assent to laws the most wholesome and necessary for the public good.

He has forbidden his governors to pass laws of immediate and pressing importance, unless suspended in their operation till his assent should be obtained, and when so suspended, he has utterly neglected to attend to them.

He has refused to pass other laws for the accommodation of large districts of people, unless those people would relinquish the right

of representation in the legislature — a right inestimable to them, and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public records, for the sole purpose of fatiguing them into compliance with his measure.

He has dissolved representative houses repeatedly, for opposing, with manly firmness, his invasions on the rights of the people.

He has refused, for a long time after such dissolutions, to cause others to be elected, whereby the legislative powers, incapable of annihilation, have returned to the people at large for their exercise; the State remaining, in the meantime, exposed to all the dangers of invasions from without, and convulsions within.

He has endeavored to prevent the population of these States; for that purpose obstructing the laws for the naturalization of foreigners; refusing to pass others to encourage their migration hither, and raising the conditions of new appropriations of lands.

He has obstructed the administration of justice, by refusing his assent to laws for establishing judiciary powers.

He has made judges dependent on his will alone for the tenure of their offices and the amount and payment of their salaries.

He has erected a multitude of new offices and sent hither swarms of officers to harass our people and eat out their substance.

He has kept among us in times of peace, standing armies, without the consent of our legislatures.

He has affected to render the military independent of, and superior to, the civil power.

He has combined with others to subject us to a jurisdiction foreign to our constitutions, and unacknowledged by our laws; giving his assent to their acts of pretended legislation:

For quartering large bodies of armed troops among us;

For protecting them, by a mock trial, from punishment for any murders which they should commit on the inhabitants of these States.

For cutting off our trade with all parts of the world;

For imposing taxes on us without our consent;

For depriving us, in many cases, of the benefits of trial by jury;

For transporting us beyond seas, to be tried for pretended offenses;

For abolishing the free system of English laws in a neighboring province, establishing therein an arbitrary government, and enlarging its boundaries, so as to render it at once an example and fit instrument for introducing the same absolute rule into these colonies;

For taking away our charters, abolishing our most valuable laws, and altering, fundamentally, the forms of our government;

For suspending our own legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.

He has abdicated government here, by declaring us out of his protection, and waging war against us.

He has plundered our seas, ravaged our coasts, burned our towns, and destroyed the lives of our people.

He is at this time transporting large armies of foreign mercenaries to complete the works of death, desolation and tyranny, already begun with circumstances of cruelty and perfidy scarcely paralleled in the most barbarous ages, and totally unworthy of the head of a civilized nation.

He has constrained our fellow-citizens, taken captive on the high seas, to bear arms against their country, to become the executioners of their friends and brethren, or to fall themselves by their hands.

He has excited domestic insurrection among us, and has endeavored to bring on the inhabitants of our frontiers the merciless Indian savages, whose known rule of warfare is an undistinguished destruction of all ages, sexes and conditions.

In every stage of these oppressions we have petitioned for redress in the most humble terms; our repeated petitions have been answered only by repeated injury. A prince whose character is thus marked by every act which may define a tyrant, is unfit to be the ruler of a free people.

Nor have we been wanting in our attention to our British brethren. We have warned them, from time to time, of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity; and we have conjured them, by the ties of common kindred, to disavow these usurpations, which would inevitably interrupt our connections and correspondence. They, too, have been deaf to the voice of justice and consanguinity. We must, therefore, acquiesce in the necessity which denounces our separation, and hold them, as we hold the rest of mankind, enemies in war, in peace friends.

We, therefore, the Representatives of the United States of America, in General Congress assembled, appealing to the Supreme Judge of the World for the rectitude of our intentions, do, in the name and by the authority of the good people of these colonies, solemnly publish and declare, That these united Colonies are, and of right ought to be, free and independent states; that they are absolved from all allegiance to the British crown, and that all political connection between them and the state of Great Britain is, and ought to be, totally dissolved; and that, as free and independent states, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may of right do. And, for the support of this declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our lives, our fortunes, and our sacred honor.

The foregoing Declaration was, by order of Congress, engrossed, and signed by the following members:

JOHN HANCOCK

NEW HAMPSHIRE
Josiah Bartlett
William Whipple
Matthew Thornton

RHODE ISLAND
Stephen Hopkins
William Ellery

CONNECTICUT
Roger Sherman
Samuel Huntington
William Williams
Oliver Wolcott

NEW YORK
William Floyd
Philip Livingston
Francis Lewis
Lewis Morris

NEW JERSEY
Richard Stockton
John Witherspoon
Francis Hopkinson
John Hart
Abraham Clark

PENNSYLVANIA
Robert Morris
Benjamin Rush
Benjamin Franklin
John Morton
George Clymer
James Smith
George Taylor
James Wilson
George Ross

MASSACHUSETTS BAY
Samuel Adams
John Adams
Robert Treat Paine
Elbridge Gerry

DELAWARE
Cæsar Rodney
George Read
Thomas M'Kean

MARYLAND
Samuel Chase
William Paca
Thomas Stone
Charles Carroll, of Carrollton

VIRGINIA
George Wythe
Richard Henry Lee
Thomas Jefferson
Benjamin Harrison
Thomas Nelson, Jr.
Francis Lightfoot Lee
Carter Braxton

NORTH CAROLINA
William Hooper
Joseph Hewes
John Penn

SOUTH CAROLINA
Edward Rutledge
Thomas Hayward, Jr.
Thomas Lynch, Jr.
Arthur Middleton

GEORGIA
Button Gwinnett
Lyman Hall
George Walton

Resolved, That copies of the Declaration be sent to the several assemblies, conventions, and committees, or councils of safety, and to the several commanding officers of the continental troops; that it be proclaimed in each of the United States, at the head of the army.

VII

ARTICLES OF CONFEDERATION

To all to whom these presents shall come, we the undersigned Delegates of the States affixed to our names, send greeting:

WHEREAS, The Delegates of the United States of America, in Congress assembled, did, on the 15th day of November, in the year of our Lord 1777, and in the second year of the Independence of America, agree to certain Articles of Confederation and perpetual Union between the States of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, in the words following, viz.:

ARTICLES OF CONFEDERATION AND PERPETUAL UNION BETWEEN THE STATES OF NEW HAMPSHIRE, MASSACHUSETTS BAY, RHODE ISLAND AND PROVIDENCE PLANTATIONS, CONNECTICUT, NEW YORK, NEW JERSEY, PENNSYLVANIA, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA, AND GEORGIA.

ARTICLE I. The style of this Confederacy shall be "The United States of America."

ARTICLE II. Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.

ARTICLE III. The said States hereby severally enter into a firm league of friendship with each other for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other against all force offered to, or attacks made upon them, or any of them, on account of religion-sovereignty, trade, or any other pretense whatever.

ARTICLE IV. The better to secure and perpetuate mutual friendship and intercourse among the people of the different States of this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively; *provided,* that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State of which the owner is an inhabitant; *provided also,* that no imposition, duties or restriction shall be laid by any State on the property of the United States, or either of them.

If any person guilty of or charged with treason, felony, or other high misdemeanor in any State, shall flee from justice, and be found

in any of the United States, he shall, upon demand of the Governor or executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offense.

Full faith and credit shall be given in each of these States to the records, acts and judicial proceedings of the courts and magistrates of every other State.

ARTICLE V. For the more convenient management of the general interests of the United States, delegates shall be annually appointed, in such manner as the Legislature of each State shall direct, to meet in Congress, on the first Monday in November in every year, with a power reserved to each State to recall its delegates, or any of them, at any time within the year, and to send others in their stead for the remainder of the year.

No State shall be represented in Congress by less than two, nor by more than seven members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the United States, for which he, or another for his benefit, receives any salary, fees or emolument of any kind.

Each State shall maintain its own delegates in a meeting of the States, and while they act as members of the committee of the States.

In determining questions in the United States, in Congress assembled, each State shall have one vote.

Freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress; and the members of Congress shall be protected in their persons from arrests and imprisonments during the time of their going to and from, and attendance on Congress, except for treason, felony, or breach of the peace.

ARTICLE VI. No State, without the consent of the United States, in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance, or treaty with any King, Prince, or State; nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office, or title of any kind whatever from any King, Prince, or foreign State; nor shall the United States in Congress assembled, or any of them, grant any title of nobility.

No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States, in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No state shall lay any imposts or duties, which may interfere with any stipulations in treaties entered into by the United States,

in Congress assembled, with any King, Prince, or State, in pursuance of any treaties already proposed by Congress to the courts of France and Spain.

No vessels of war shall be kept up in time of peace by any State, except such number only as shall be deemed necessary by the United States, in Congress assembled, for the defense of such State, or its trade; nor shall any body of forces be kept up by any State, in time of peace, except such number only, as in the judgment of the United States, in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defense of such State; but every State shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and have constantly ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition and camp equipage.

No State shall engage in any war without the consent of the United States, in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay till the United States, in Congress assembled, can be consulted. Nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States, in Congress assembled, and then only against the Kingdom or State, and the subjects thereof, against which war has been so declared; and under such regulations as shall be established by the United States, in Congress assembled; unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States, in Congress assembled, shall determine otherwise.

Article VII. When land forces are raised by any State for the common defense, all officers of or under the rank of colonel shall be appointed by the Legislature of each State, respectively, by whom such forces shall be raised, or in such manner as such State shall direct, and all vacancies shall be filled up by the State which first made the appointment.

Article VIII. All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States, in Congress assembled, shall be defrayed out of the common treasury, which shall be supplied by the several States, in proportion to the value of all land within each State, granted to or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States, in Congress assembled, shall, from time to time, direct and appoint. The taxes for paying that proportion shall be laid and levied by the authority and direction of the Legislatures of the several States, within the time agreed upon by the United States, in Congress assembled.

ARTICLE IX. The United States, in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article; of sending and receiving ambassadors; entering into treaties and alliances; *provided,* that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever; of establishing rules for deciding, in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated; of granting letters of marque and reprisal in times of peace; appointing courts for the trial of piracies and felonies committed on the high seas, and establishing courts for receiving and determining finally appeals in all cases of captures; *provided,* that no member of Congress shall be appointed a judge of any of the said courts.

The United States, in Congress assembled, shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise, between two or more States concerning boundary, jurisdiction, or any other cause whatever; which authority shall always be exercised in the manner following: Whenever the legislative or executive authority, or lawful agent of any State in controversy with another, shall present a petition to Congress, stating the matter in question, and praying for a hearing, notice thereof shall be given, by order of Congress, to the legislative or executive authority of the other State in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question; but if they can not agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven, nor more than nine names, as Congress shall direct, shall, in the presence of Congress, be drawn out by lot, and the persons whose names shall be so drawn, or any five of them, shall be commissioners or judges to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination; and if either party shall neglect to attend at the day appointed, without showing reasons, which Congress shall judge sufficient, or being present shall refuse to strike, the Congress shall proceed to nominate three persons out of each State, and the Secretary of Congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court to be appointed, in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or

cause, the court shall, nevertheless, proceed to pronounce sentence or judgment, which shall in like manner be final and decisive, the judgment or sentence and other proceedings being in either case transmitted to Congress, and lodged among the Acts of Congress for the security of the parties concerned; *provided,* that every commissioner, before he sits in judgment, shall take an oath, to be administered by one of the Judges of the Supreme or Superior Court of the State where the cause shall be tried, "well and truly to hear and determine the matter in question, according to the best of his judgment, without favor, affection, or hope of reward"; *provided, also,* that no State shall be deprived of territory for the benefit of the United States.

All controversies concerning the private right of soil claimed under different grants of two or more States, whose jurisdictions as they may respect such lands, and the States which passed such grants, are adjusted, the said grants, or either of them, being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall, on the petition of either party to the Congress of the United States, be finally determined as near as may be in the same manner as is before described for deciding disputes respecting territorial jurisdiction between different States.

The United States, in Congress assembled, shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States; fixing the standard of weights and measures throughout the United States; regulating the trade, and managing all affairs with the Indians, not members of any of the States; *provided,* that the legislative right of any State, within its own limits, be not infringed or violated; establishing and regulating postoffices from one State to another, throughout all the United States, and exacting such postage on the papers passing through the same as may be requisite to defray the expenses of the said office; appointing all officers of the land forces in the service of the United States, excepting regimental officers; appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States; making rules for the government and regulation of the said land and naval forces, and directing their operations.

The United States, in Congress assembled, shall have authority to appoint a committee, to sit in the recess of Congress, to be denominated a "Committee of the States," and to consist of one delegate from each State; and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction; to appoint one of their number to preside; *provided,* that no person be allowed to serve in the office of President more than one year in any term of three years; to ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses; to borrow money or emit bills on the credit of the United States, transmitting every half year to the respective States an account of the sums of money so

borrowed or emitted; to build and equip a navy; to agree upon the number of land forces, and to make requisitions from each State for its quota, in proportion to the number of white inhabitants in such State, which requisition shall be binding, and thereupon the Legislature of each State shall appoint the regimental officers, raise the men, and clothe, arm and equip them in a soldier-like manner, at the expense of the United States; and the officers and men so clothed, armed and equipped shall march to the place appointed, and within the time agreed on by the United States, in Congress assembled. But if the United States, in Congress assembled, shall, on consideration of circumstances, judge proper that any State should not raise men, or should raise a smaller number than its quota, and that any other State should raise a greater number of men than the quota thereof, such extra number shall be raised, officered, clothed, armed, and equipped in the same manner as the quota of such State, unless the Legislature of such State shall judge that such extra number can not be safely spared out of the same, in which case they shall raise, officer, clothe, arm, and equip as many of such extra number as they judge can be safely spared. And the officers and men so clothed, armed, and equipped shall march to the place appointed, and within the time agreed on by the United States, in Congress assembled.

The United States, in Congress assembled, shall never engage in a war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defense and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money, nor agree upon the number of vessels of war to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander-in-chief of the army or navy, unless nine States assent to the same, nor shall a question on any other point, except for adjourning from day to day, be determined, unless by the votes of a majority of the United States, in Congress assembled.

The Congress of the United States shall have power to adjourn to any time within the year, and to any place within the United States, so that no period of adjournment be for a longer duration than the space of six months; and shall publish the journal of their proceedings monthly, except such parts thereof relating to treaties, alliances, or military operations, as in their judgment require secrecy; and the yeas and nays of the delegates of each State on any question shall be entered on the journal, when it is desired by any delegate; and the delegates of a State, or any of them, at his or their request, shall be furnished with a transcript of the said journal, except such parts as are above excepted, to lay before the Legislatures of the several States.

Article X. The Committee of the States, or any nine of them, shall be authorized to execute, in the recess of Congress, such of the powers of Congress as the United States, in Congress assembled, by

the consent of nine States, shall, from time to time, think expedient to vest them with; *provided*, that no power be delegated to the said committee, for the exercise of which, by the Articles of Confederation, the voice of nine States in the Congress of the United States assembled is requisite.

Article XI. Canada acceding to this Confederation, and joining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union; but no other colony shall be admitted into the same, unless such admission be agreed to by nine States.

Article XII. All bills of credit emitted, moneys borrowed and debts contracted by or under the authority of Congress, before the assembling of the United States, in pursuance of the present Confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States and the public faith are hereby solemnly pledged.

Article XIII. Every State shall abide by the determinations of the United States, in Congress assembled, on all questions which by this Confederation are submitted to them. And the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the Legislatures of every State.

And Whereas, It hath pleased the Great Governor of the world to incline the hearts of the Legislatures we respectively represent in Congress, to approve of, and to authorize us to ratify the said Articles of Confederation and perpetual Union. Know ye that we, the undersigned delegates, by virtue of the power and authority to us given for that purpose, do by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said Articles of Confederation and perpetual Union, and all and singular the matters and things therein contained.

And we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the determinations of the United States, in Congress assembled, on all questions which by the said Confederation are submitted to them; and that the articles thereof shall be inviolably observed by the States we respectively represent, and that the Union shall be perpetual.

In witness whereof, we have hereunto set our hands in Congress. Done at Philadelphia, in the State of Pennsylvania, the 9th day of July, in the year of our Lord, 1778, and in the 3d year of the Independence of America.

JOSIAH BARTLETT,	JOHN WENTWORTH, JR., Aug. 8, 1778.	On the part and behalf of the State of New Hampshire.
JOHN HANCOCK, SAMUEL ADAMS, ELBRIDGE GERRY,	FRANCIS DANA, JAMES LOVELL, SAMUEL HOLTON,	On the part and behalf of the State of Massachus'ts Bay.
WILLIAM ELLERY, HENRY MARCHANT,	JOHN COLLINS,	On the part and behalf of the State of Rhode Island and Providence Plantations.
ROGER SHERMAN, SAMUEL HUNTINGTON, OLIVER WOLCOTT,	TITUS HOSMER, ANDREW ADAM,	On the part and behalf of the State of Connecticut.
JAMES DUANE, FRANCIS LEWIS,	WILLIAM DUER, GOUVERNEUR MORRIS,	On the part and behalf of the State of New York.
JOHN WITHERSPOON,	NATHANIEL SCUDDER,	On the part and behalf of the State of New Jersey, November 26, 1778.
ROBERT MORRIS, DANIEL ROBERDEAU, J. BAYARD SMITH,	WILLIAM CLINGAN, JOSEPH REED, July 22, 1778.	On the part and behalf of the State of Pennsylvania.
THOMAS MCKEAN, Feb. 12, 1779. NICHOLAS VAN DYKE,	JOHN DICKINSON, May 5, 1779.	On the part and behalf of the State of Delaware.
JOHN HANSON, March 1, 1781.	DANIEL CARROLL, March 1, 1781.	On the part and behalf of the State of Maryland.
RICHARD HENRY LEE, JOHN BANISTER, THOMAS ADAMS,	JOHN HARVIE, F. LIGHTFOOT LEE,	On the part and behalf of the State of Virginia.
JOHN PENN, July 21, 1778.	CORNELIUS HARNETT, JOHN WILLIAMS,	On the part and behalf of the State of North Carolina.
HENRY LAURENS, WM. HENRY DRAYTON, JOHN MATTHEWS,	RICHARD HUTSON, THOS. HEYWARD, JR.,	On the part and behalf of the State of South Carolina.
JOHN WALTON, July 24, 1778.	EDWARD TELFAIR, EDWARD LONGWORTHY,	On the part and behalf of the State of Georgia.

The Articles of Confederation were ratified by the States as follows:

South Carolina	February 5, 1778	Massachusetts	March 10, 1778
New York	February 6, 1778	North Carolina	April 5, 1778
Rhode Island	February 9, 1778	New Jersey	November 19, 1778
Connecticut	February 12, 1778	Virginia	December 15, 1778
Georgia	February 26, 1778	Delaware	February 1, 1779
New Hampshire	March 4, 1778	Maryland	January 30, 1781
Pennsylvania	March 6, 1778		

The ratification by all the States was formally announced to the public March 1, 1781.

VIII

THE VIRGINIA STATUTE OF RELIGIOUS LIBERTY

October 1785

An Act for establishing Religious Freedom.

I. Whereas Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do; that the impious presumption of legislators and rulers, civil as well as ecclesiastical, who being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavouring to impose them on others, hath established and maintained false religions over the greatest part of the world, and through all time; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness, and is withdrawing from the ministry those temporary rewards, which proceeding from an approbation of their personal conduct, are an additional incitement to earnest and unremitting labours for the instruction of mankind; that our civil rights have no dependence on our religious opinions, any more than our opinions in physics or geometry; that therefore the proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which in common with his fellow-citizens he has a natural right; that it tends only to corrupt the principles of that religion it is meant to encourage, by bribing with a monopoly of worldly honours and emoluments, those who will externally profess and conform to it; that though indeed these are criminal who do not withstand such temptation, yet neither are those innocent who lay the bait in their way; that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty, because he being of course judge of that tendency will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own; that it is time enough for the rightful purposes of civil govern-

ment, for its officers to interfere when principles break out into overt acts against peace and good order; and finally, that truth is great and will prevail if left to herself, that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict, unless by human interposition disarmed of her natural weapons, free argument and debate, errors ceasing to be dangerous when it is permitted freely to contradict them.

II. Be it enacted by the General Assembly, that no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain their opinion in matters of religion, and that the same shall in no wise diminish, enlarge or affect their civil capacities.

III. And though we well know that this Assembly, elected by the people for the ordinary purposes of legislation only, have no power to restrain the acts of succeeding Assemblies, constituted with powers equal to our own, and that therefore to declare this Act to be irrevocable would be of no effect in law; yet as we are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind, and that if any Act shall hereafter be passed to repeal the present, or to narrow its operation, such Act will be an infringement of natural right.

IX

THE VIRGINIA PLAN

(*a*) *Text of the Plan*

1. Resolved that the articles of Confederation ought to be so corrected and enlarged as to accomplish the objects proposed by their institution; namely, " common defense, security of liberty and general welfare."

2. Resolved therefore that the rights of suffrage in the National Legislature ought to be proportioned to the Quotas of contribution, or to the number of free inhabitants, as the one or the other rule may seem best in different cases.

3. Resolved that the National Legislature ought to consist of two branches.

4. Resolved that the members of the first branch of the National Legislature ought to be elected by the people of the several States every for the term of ; to be of the age of years at least, to receive liberal stipends by which they may be compensated for the devotion of their time to public service; to be ineligible to any office established by a particular State, or under the authority of the United States, except those peculiarly belonging to

the functions of the first branch, during the term of service, and for the space of after its expiration; to be incapable of re-election for the space of after the expiration of their term of service, and to be subject to recall.

5. Resolved that the members of the second branch of the National Legislature ought to be elected by those of the first, out of a proper number of persons nominated by the individual Legislatures, to be of the age of years at least; to hold their offices for a term sufficient to ensure their independency, to receive liberal stipends, by which they may be compensated for the devotion of their time to public service; and to be ineligible to any office established by a particular State, or under the authority of the United States, except those peculiarly belonging to the functions of the second branch, during the term of service, and for the space of after the expiration thereof.

6. Resolved that each branch ought to possess the right of originating Acts; that the National Legislature ought to be impowered to enjoy the Legislative Rights vested in Congress by the Confederation and moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation; to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union; and to call forth the force of the Union against any member of the Union failing to fulfill its duty under the articles thereof.

7. Resolved that a National Executive be instituted; to be chosen by the National Legislature for the term of years, to receive punctually at stated times a fixed compensation for the services rendered, in which no increase or diminution shall be made so as to affect the Magistracy, existing at the time of increase or diminution, and to be ineligible a second time; and that besides a general authority to execute the National Laws, it ought to enjoy the Executive rights vested in Congress by the Confederation.

8. Resolved that the Executive and a convenient number of the National Judiciary, ought to compose a council of revision with authority to examine every act of the National Legislature before it shall operate, and every act of a particular Legislature before a Negative thereon shall be final; and that the dissent of the said Council shall amount to a rejection, unless the Act of the National Legislature be again passed, or that of a particular Legislature be again negatived by of the members of each branch.

9. Resolved that a National Judiciary be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature, to hold their offices during good behaviour; and to receive punctually at stated times fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution, that the jurisdiction of the inferior

tribunals shall be to hear and determine in the first instance, and of the supreme tribunal to hear and determine in the dernier resort, all piracies and felonies on the high seas, captures from an enemy; cases in which foreigners or citizens of other States applying to such jurisdictions may be interested, or which respect the collection of the National revenue; impeachments of any National officers, and questions which may involve the national peace and harmony.

10. Resolved that provision ought to be made for the admission of States lawfully arising within the limits of the United States, whether from a voluntary junction of Government and Territory or otherwise, with the consent of a number of voices in the National Legislature less than the whole.

11. Resolved that a Republican Government and the territory of each State, except in the instance of a voluntary junction of Government and territory, ought to be guaranteed by the United States to each State.

12. Resolved that provision ought to be made for the continuance of Congress and their authorities and privileges, until a given day after the reform of the articles of Union shall be adopted, and for the completion of all their engagements.

13. Resolved that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto.

14. Resolved that the Legislative Executive and Judiciary powers within the several States ought to be bound by oath to support the articles of Union.

15. Resolved that the amendments which shall be offered to the Confederation, by the Convention ought at a proper time, or times, after the approbation of Congress to be submitted to an assembly or assemblies of Representatives, recommended by the several Legislatures to be expressly chosen by the people, to consider and decide thereon.

(*b*) *Edmund Randolph on the Virginia Plan.*[1]

Mr. Randolph then opened the main business. He expressed his regret, that it should fall to him, rather than those, who were of longer standing in life and political experience, to open the great subject of their mission. But, as the convention had originated from Virginia, and his colleagues supposed that some proposition was expected from them, they had imposed this task on him.

He then commented on the difficulty of the crisis, and the necessity of preventing the fulfilment of the prophecies of the American downfall.

He observed that in revising the fœderal system we ought to inquire (1) into the properties which such a government ought to

[1] From Madison's notes. May 29, 1787.

possess, (2) the defects of the Confederation, (3) the danger of our situation, and (4) the remedy.

1. The character of such a government ought to secure (1) against foreign invasion; (2) against dissentions between members of the Union, or seditions in particular States; (3) to procure to the several States various blessings, of which an isolated situation was incapable; (4) to be able to defend itself against incroachment; and (5) to be paramount to the State Constitutions.

2. In speaking of the defects of the Confederation he professed a high respect for its authors, and considered them as having done all that patriots could do, in the then infancy of the science of constitutions and of confederacies — when the inefficiency of requisitions was unknown — no commercial discord had arisen among any States — no rebellion had appeared as in Massachusetts — foreign debts had not become urgent — the havoc of paper money had not been foreseen — treaties had not been violated — and perhaps nothing better could be obtained from the jealousy of the States with regard to their sovereignty.

He then proceeded to enumerate the defects: (1) that the Confederation produced no security against foreign invasion; Congress not being permitted to prevent a war nor to support it by their own authority. Of this he cited many examples; most of which tended to shew that they could not cause infractions of treaties or of the law of nations to be punished; that particular States might by their conduct provoke war without controul; and that neither militia nor drafts being fit for defence on such occasions, enlistments only could be successful, and these could not be executed without money. (2) That the fœderal government could not check the quarrels between States, nor a rebellion in any, not having constitutional power nor means to interpose according to the exigency. (3) That there were many advantages which the United States might acquire, which were not attainable under the Confederation — such as a productive impost, counteraction of the commercial regulations of other nations, pushing of commerce ad libitum, etc., etc. (4) That the fœderal government could not defend itself against incroachments from the States. (5) That it was not even paramount to the State Constitutions, ratified, as it was in many of the States.

3. He next reviewed the danger of our situation, and appealed to the sense of the best friends of the United States — the prospect of anarchy from the laxity of government everywhere; and to other considerations.

4. He then proceeded to the remedy; the basis of which he said must be the republican principle.

He proposed as conformable to his ideas the following resolutions, which he explained one by one.

(Mr. Randolph then presented the Virginia resolutions.)

He concluded with an exhortation, not to suffer the present opportunity of establishing general peace, harmony, happiness and liberty in the United States to pass away unimproved.

It was then *resolved* — That the House will tomorrow resolve itself into a committee of the whole house to consider of the state of the American Union, and that the propositions moved by Mr. Randolph be referred to the said committee.

X

THE NEW JERSEY PLAN

(*a*) *Text of the Plan.*

1. Resolved that the articles of Confederation ought to be so revised, corrected and enlarged, as to render the federal Constitution adequate to the exigencies of Government, and the preservation of the Union.

2. Resolved that in addition to the powers vested in the United States in Congress, by the present existing articles of Confederation, they be authorized to pass acts for raising a revenue, by levying a duty or duties on all goods or merchandizes of foreign growth or manufacture, imported into any part of the United States, by Stamps on paper, vellum or parchment, and by a postage on all letters or packages passing through the general post-Office, to be applied to such federal purposes as they shall deem proper and expedient; to make rules and regulations for the collection thereof; and the same from time to time, to alter and amend in such manner as they shall think proper; to pass Acts for the regulation of trade and commerce as well with foreign nations as with each other; provided that all punishments, fines, forfeitures and penalties to be incurred for contravening such acts, rules and regulations shall be adjudged by the Common law Judiciarys of the State in which any offense contrary to the true intent and meaning of such Acts, rules and regulations shall have been committed or perpetrated, with liberty of commencing in the first instance all suits and prosecutions for that purpose in the superior Common law Judiciary in such State, subject nevertheless, for the correction of all errors, both in law and fact in rendering judgment, to an appeal to the Judiciary of the United States.

3. Resolved that whenever requisitions shall be necessary, instead of the rule for making requisitions mentioned in the articles of Confederation, the United States in Congress be authorized to make such requisitions in proportion to the whole number of white and other free citizens and inhabitants of every age, sex and condition, including those bound to servitude for a term of years and three-fifths of all other persons not comprehended in the foregoing description, except Indians not paying taxes; that if such requisitions be not complied with, in the time specified therein, to direct the collection thereof in the non complying States and for that purpose to devise and pass acts directing and authorizing the same; provided

that none of the powers hereby vested in the United States in Congress shall be exercised without the consent of at least States, and in that proportion if the number of Confederated States should hereafter be increased or diminished.

4. Resolved that the United States in Congress be authorized to elect a federal Executive to consist of persons, to continue in office for the term of years, to receive punctually at stated times a fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons composing the Executive at the time of such increase or diminution, to be paid out of the federal treasury; to be incapable of holding any other office or appointment during their time of service and for years thereafter; to be ineligible a second time, and removable by Congress on application by a majority of the Executives of the several States; that the Executives besides their general authority to execute the federal acts ought to appoint all federal officers not otherwise provided for, and to direct all military operations; provided that none of the persons composing the federal Executive shall on any occasion take command of any troops, so as personally to conduct any enterprise as General, or in other capacity.

5. Resolved that a federal Judiciary be established to consist of a supreme Tribunal the Judges of which to be appointed by the Executive, and to hold their offices during good behaviour, to receive punctually at stated times a fixed compensation for their services in which no increase or diminution shall be made, so as to affect the persons actually in office at the time of such increase or diminution; that the Judiciary so established shall have authority to hear and determine in the first instance on all impeachments of federal officers, and by way of appeal in the dernier resort in all cases touching the rights of Ambassadors, in all cases of captures from an enemy, in all cases of piracies and felonies on the high seas, in all cases in which foreigners may be interested, in the construction of any treaty or treaties, or which may arise on any of the Acts for regulation of trade, or the collection of the federal Revenue; that none of the Judiciary shall during the time they remain in Office be capable of receiving or holding any other office or appointment during their time of service, or for thereafter.

6. Resolved that all Acts of the United States in Congress made by virtue and in pursuance of the powers hereby and by the articles of confederation vested in them, and all Treaties made and ratified under the authority of the United States shall be the supreme law of the respective States so far forth as those Acts or Treaties shall relate to the said States or their Citizens, and that the Judiciary of the several States shall be bound thereby in their decisions, any thing in the respective laws of the Individual States to the contrary notwithstanding; and that if any State, or any body of men in any State shall oppose or prevent the carrying into execution such acts or treaties, the federal Executive shall be authorized to call forth the power of the Confederated States, or so much thereof as may be

necessary to enforce and compel an obedience to such Acts, or an Observance of such Treaties.

7. Resolved that provision be made for the admission of new States into the Union.

8. Resolved the rule for naturalization ought to be the same in every State.

9. Resolved that a Citizen of one State committing an offense in another State of the Union, shall be deemed guilty of the same offense as if it had been committed by a Citizen of the State in which the offense was committed.

(*b*) *Debates in the Federal Convention on the New Jersey Plan.*[1]

16 June. In Committee of the Whole

Mr. Paterson [N. J.] said as he had on a former occasion given his sentiments on the plan proposed by Mr. R. he would now, avoiding repetition as much as possible, give his reasons in favor of that proposed by himself. He preferred it because it accorded, first, with the powers of the Convention, second, with the sentiments of the people. If the Confederacy was radically wrong, let us return to our States, and obtain larger powers, not assume them of ourselves. I came here not to speak my own sentiments, but the sentiments of those who sent me. Our object is not such a government as may be best in itself, but such a one as our constituents have authorized us to prepare, and as they will approve. If we argue the matter on the supposition that no Confederacy at present exists, it can not be denied that all the States stand on the footing of equal sovereignty. All, therefore, must concur before any can be bound. If a proportional representation be right, why do we not vote so here? If we argue on the fact that a federal compact actually exists, and consult the articles of it, we still find an equal sovereignty to be the basis of it. He reads the 5th art. of [the Articles of] Confederation, giving each State a vote, and the 13th, declaring that no alteration shall be made without unanimous consent. This is the nature of all treaties.

What is unanimously done must be unanimously undone. It was observed that the larger States gave up the point, not because it was right, but because the circumstances of the moment urged the concession. Be it so. Are they for that reason at liberty to take it back? Can the donor resume his gift without the consent of the donee? This doctrine may be convenient, but it is a doctrine that will sacrifice the lesser States. The large States acceded readily to the Confederacy. It was the small ones that came in reluctantly and slowly. New Jersey and Maryland were the two last, the former objecting to the want of power in Congress over trade: both of them to the want of power to appropriate the vacant territory to the benefit of the whole. If the sovereignty of the States is to be maintained, the Representatives must be drawn immediately from the States, not from the people; and we have no power to vary the

[1] From Madison's notes.

idea of equal sovereignty. The only expedient that will cure the difficulty is that of throwing the States into hotchpot. To say that this is impracticable will not make it so. Let it be tried, and we shall see whether the citizens of Massachusetts, Pennsylvania, and Virginia accede to it. It will be objected that coercion will be impracticable. But will it be more so in one plan than the other? Its efficacy will depend on the quantum of power collected, not on its being drawn from the States, or from the individuals; and according to his plan it may be exerted on individuals as well as according to that of Mr. R. A distinct executive and judiciary also were equally provided by his plan. It is urged that two branches in the Legislature are necessary. Why? for the purpose of a check. But the reason for the precaution is not applicable to this case. Within a particular State, where party heats prevail, such a check may be necessary. In such a body as Congress it is less necessary, and besides, the delegations of the different States are checks on each other. Do the people at large complain of Congress? No, what they wish is that Congress may have more power. If the power now proposed be not eno', the people hereafter will make additions to it. With proper powers, Congress will act with more energy and wisdom than the proposed National Legislature; being fewer in number and more secreted and refined by the mode of election. The plan of Mr. R. will also be enormously expensive. Allowing Georgia and Delaware two representatives each in the popular branch, the aggregate number of that branch will be 180. Add to it half as many for the other branch and you have 270 members coming once at least a year from the most distant as well as the most central parts of the republic. In the present deranged state of our finances can so expensive a system be seriously thought of? By enlarging the powers of Congress the greatest part of this expense will be saved, and all purposes will be answered. At least a trial ought to be made.

Mr. Wilson entered into a contrast of the principal points of the two plans so far, he said, as there had been time to examine the one last proposed. These points were: 1. In the Virginia plan there are two, and in some degree three branches in the Legislature: in the plan from New Jersey there is to be a *single* legislature only. 2. Representation of the people at large is the basis of the one: the State Legislatures the pillars of the other. 3. Proportional representation prevails in one: equality of suffrage in the other. 4. A single Executive Magistrate is at the head of the one: a plurality is held out in the other. 5. In the one a majority of the people of the United States must prevail: in the other a minority may prevail. 6. The National Legislature is to make laws in all cases to which the separate States are incompetent and, in place of this Congress are to have additional power in a few cases only. 7. A negative on the laws of the States: in place of this coercion to be substituted. 8. The Executive to be removeable on impeachment and conviction in one plan: in the other to be removeable at the instance of a majority of the executives of the States. 9. Revision of the laws

provided for in one: no such check in the other. 10. Inferior national tribunals in one: none such in the other. 11. In the one, jurisdiction of National tribunals to extend, etc.: an appellate jurisdiction only allowed in the other. 12. Here the jurisdiction is to extend to all cases affecting the national peace and harmony: there, a few cases only are marked out. 13. Finally, the ratification is in this to be by the people themselves: in that by the legislative authorities according to the 13th Article of Confederation.

With regard to the power of the Convention he conceived himself authorized to conclude nothing, but to be at liberty to propose anything. In this particular he felt himself perfectly indifferent to the two plans.

With regard to the sentiments of the people he conceived it difficult to know precisely what they are. Those of the particular circle in which one moved were commonly mistaken for the general voice. He could not persuade himself that the State governments and sovereignties were so much the idols of the people, nor a national government so obnoxious to them, as some supposed. Why should a national government be unpopular? Has it less dignity? Will each citizen enjoy under it less liberty or protection? Will a citizen of Delaware be degraded by becoming a citizen of the United States? Where do the people look at present for relief from the evil of which they complain? Is it from an internal reform of their governments? No, Sir. It is from the national councils that relief is expected. For these reasons he did not fear that the people would not follow us into a national government, and it will be a further recommendation of Mr. R.'s plan that it is to be submitted to them, and not to the Legislatures, for ratification.

Proceeding now to the first point on which he had contrasted the two plans, he observed that anxious as he was for some augmentation of the federal powers, it would be with extreme reluctance indeed that he could ever consent to give powers to Congress: he had two reasons either of which was sufficient. 1. Congress as a legislative body does not stand on the people. . . . He would not repeat the remarks he had formerly made on the principles of Representation; he would only say that an inequality in it has ever been a poison contaminating every branch of government. In Great Britain, where this poison has had a full operation, the security of private rights is owing entirely to the purity of her tribunals of justice, the judges of which are neither appointed nor paid by a venal Parliament. The political liberty of that nation, owing to the inequality of representation, is at the mercy of its rulers. He means not to insinuate that there is any parallel between the situation of that country and ours at present. But it is a lesson we ought not to disregard, that the smallest bodies in Great Britain are notoriously the most corrupt. Every other source of influence must also be stronger in small than large bodies of men. When Lord Chesterfield had told us that one of the Dutch provinces had been seduced into the views of France, he need not have added, that it was not Holland, but one of the smallest of them. There are facts among

ourselves which are known to all. Passing over others, he will only remark that the Impost, so anxiously wished for by the public, was defeated not by any of the larger States in the Union. 2. Congress is a single Legislature. Despotism comes on mankind in different shapes, sometimes in an executive, sometimes in a military one. Is there no danger of a legislative despotism? Theory and practice both proclaim it. If the legislative authority be not restrained there can be neither liberty nor stability; and it can only be restrained by dividing it within itself, into distinct and independent branches. In a single house there is no check, but the inadequate one, of the virtue and good sense of those who compose it.

On another great point the contrast was equally favorable to the plan reported by the committee of the whole. It vested the executive powers in a single magistrate. The plan of New Jersey vested them in a plurality. In order to controul the legislative authority you must divide it. In order to controul the executive, you must unite it. One man will be more responsible than three. Three will contend among themselves till one becomes the master of his colleagues. In the triumvirates of Rome, first Caesar, then Augustus, are witnesses of this truth. The Kings of Sparta and the Consuls of Rome prove also the factious consequences of dividing the Executive Magistracy. Having already taken up so much time he would not, he said, proceed to any of the other points. Those on which he had dwelt, are sufficient of themselves: and on a decision of them the fate of the others will depend.

Mr. PINCKNEY, the whole comes to this, as he conceived. Give New Jersey an equal vote, and she will dismiss her scruples, and concur in the National system. He thought the Convention authorized to go any length in recommending, which they found necessary to remedy the evils which produced this Convention.

XI

THE PINCKNEY PLAN

Madison's Notes of May 29, 1787, contain the following reference to the Pinckney Plan:

"Mr. Charles Pinckney laid before the House the draft of a federal government which he had prepared, to be agreed upon between the free and independent States of America. — Mr. Pinckney's plan ordered that the same be referred to the committee of the whole appointed to consider the state of the American Union."

This plan was submitted by Mr. Pinckney after Edmund Randolph had explained and presented the Virginia plan. The Pinckney plan was found by Professor Andrew C. McLaughlin among the Wilson papers, and in the handwriting of James Wilson. It is doubtless a summary of the scheme made by Mr. Wilson for his own purposes. The plan follows:

1. A Confederation between the free and independent States of N. H. etc. is hereby solemnly made uniting them together under one superintending Government for their common Benefit and for their Defense and Security against all Designs and Leagues that may be injurious to their Interests and against all Forc(e) (?) and Attacks offered to or made upon them or any of them

2. The Stile

3. Mutual Intercourse — Community of Privileges — Surrender of Criminals — Faith to Proceedings etc.

4. Two Branches of the Legislature — Senate — House of Delegates — together the United States in Congress assembled

H. D. to consist of one Member for every thousand Inhabitants 3/5 of Blacks included.

Senate to be elected from four Districts — to serve by Rotation of four Years — to be elected by the H. D. either from among themselves or the People at large

5. The Senate and H. D. shall by joint Ballot annually (septennially) chuse the Presidt. U.S. from among themselves or the People at large. — In the Presidt. the executive authority of the U.S. shall be vested. — His Powers and Duties — He shall have a Right to advise with the Heads of the different Departments as his Council

6. Council of Revision, consisting of the Presidt. S. for for. Affairs S. of War, Heads of the Departments of Treasury and Admiralty or any two of them togr wt the Presidt.

7. The Members of S. and H. D. shall each have one Vote, and shall be paid out of the common Treasury.

8. The Time of the Election of the Members of the H.D. and of the Meeting of the U.S. in C. assembled.

9. No State to make Treaties — lay interfering Duties — keep a naval or land Force Militia excepted to be disciplined etc according to the Regulations of the U.S.

10. Each State retains its Rights not expressly delegated — But not Bill of the Legislature of any State shall become a law till it shall have been lain before the S. and H.D. in C. assembled and receive their Approbation.

11. The exclusive Power of S. and H.D. in C. assembled

12. The S. and H.D. in C. ass. shall have exclusive Power of regulating trade abd levying Imposts — Each State may lay Embargoes in Times of Scarcity.

13. ———— of establishing Post-Offices

14. S. and H.D. in C. ass. shall be the last Resort on Appeal in Disputes between two or more States; which Authority shall be exercised in the following Manner etc

15. S. and H.D. in C. ass. shall institute offices and appoint officers for the Departments of for. Affairs, War, Treasury and Admiralty.

They shall have the exclusive Power of declaring what shall be Treason and Misp. of Treason agt. U.S. — and of instituting a federal judicial Court, to which an Appeal shall be allowed from the judicial Courts of the Several States in all Causes wherein Ques-

tions shall arise on the Construction of Treaties made by U.S. — or on the Laws of Nations — or on the Regulations of U. S. concerning Trade and Revenue — or wherein U.S. shall be a party — The Court shall consist of Judges to be appointed during good Behaviour — S and H. D. in C. ass. shall have the exclusive Right of instituting in each State a Court of Admiralty, and appointing the Judges etc of the same for all maritime Causes which may arise therein respectively

16. S and H.D. in C. ass. shall have the exclusive Right of coining Money — regulating its Alloy and Value — fixing the Standard of Weights and Measures throughout U.S.

17. Points in which the Assent of more than a bare Majority shall be necessary.

18. Impeachments shall be by the H.D. before the Senate and the Judges of the federal judicial Court.

19. S. and H.D. in C. ass. shall regulate the Militia thro' the U.S.

20. Means of enforcing and compelling the Payment of the Quota of each State.

21. Manner and Conditions of admitting new States.

22. Power of dividing annexing and consolidating States, on the Consent and Petition of such States.

23. The assent of the Legislature of States shall be sufficient to invest future additional Powers in U.S. in C. ass. and shall bind the whole Confederacy.

24. The Articles of Confederation shall be inviolably observed, and the Union shall be perpetual: unless altered as before directed

25. The said States of N.H. etc guarantee mutually each other and their rights against all other Powers and against all Rebellion etc.

XII

ALEXANDER HAMILTON'S PLAN OF GOVERNMENT

(*a*) *The scheme of government presented by Hamilton June 18, 1787.*

1. The supreme legislative power of the United States of America to be vested in two distinct bodies of men; the one to be called the assembly, the other the senate; who, together, shall form the legislature of the United States; with power to pass all laws whatsoever, subject to the negative hereafter mentioned.

2. The assembly to consist of persons elected by the people; to serve for three years.

3. The Senate to consist of persons elected to serve during good behavior; their election to be made by electors chosen for that purpose by the people. In order to do this, the states to be divided into election districts. On the death, removal, or resignation of any senator, his place to be filled out of the district from which he came.

4. The supreme executive authority of the United States to be vested in a governor, to be elected to serve during good behavior.

His election to be made by electors, chosen by electors, chosen by the people in the election districts aforesaid. His authorities and functions to be as follows: to have a negative upon all laws about to be passed, and the execution of all laws passed; to have the entire direction of war, when authorized, or begun; to have, with the advice and approbation of the senate, the power of making all treaties; to have the sole appointment of the heads or chief officers of the departments of finance, war, and foreign affairs; to have the nomination of all other officers (ambassadors to foreign nations included) subject to the approbation or rejection of the senate; to have the power of pardoning all offences, except treason, which he shall not pardon, without the approbation of the senate.

5. On the death, resignation, or removal of the governor, his authorities shall be exercised by the president of the senate, until a successor be appointed.

6. The senate to have sole power of declaring war; the power of advising and approving all treaties; the power of approving or rejecting all appointments of officers, except the heads or chiefs of the departments of finance, war, and foreign affairs.

7. The supreme judicial authority of the United States to be vested in ———— judges, to hold their offices during good behavior, with adequate and permanent salaries. This court to have original jurisdiction in all cases of capture; and an appellative jurisdiction in all causes, in which the revenues of the general government, or the citizens of foreign nations, are concerned.

8. The legislature of the United States to have power to institute courts in each state, for the determination of all matters of general concern.

9. The governors, senators, and all officers of the United States to be liable for impeachment for mal and corrupt conduct; and, upon conviction, to be removed from office, and disqualified for holding any place of trust, or profit. All impeachments to be tried by a court to consist of the chief, or senior judge of the superior court of law in each state; provided, that such judge hold his place during good behavior, and have a permanent salary.

10. All laws of the particular states, contrary to the constitution or laws of the United States, to be utterly void. And the better to prevent such laws being passed, the governor or president of each state shall be appointed by the general government, and shall have a negative upon the laws about to be passed in the state of which he is governor, or president.

11. No state to have any forces, land or naval; and the militia of all the states to be under the sole and exclusive direction of the United States; and the officers to be appointed and commissioned by them.

(*b*) *Hamilton's ideas of government as expressed in the Federal Convention.*

According to Yates's Notes, Alexander Hamilton gave his views to the Constitutional Convention on June 18, 1787:

Mr. HAMILTON. To deliver my sentiments on so important a subject, when the first characters in the Union have gone before me, inspires me with the greatest diffidence, especially when my own ideas are so materially dissimilar to the plans now before the committee. My situation is disagreeable, but it would be criminal not to come forward on a subject of such magnitude. I have well considered the subject, and am convinced that no amendment of the Confederation can answer the purpose of a good government, so long as State sovereignties do in any shape, exist; and I have great doubts whether a national government on the Virginia plan can be made effectual. What is federal? An association of several independent states into one. How or in what manner this association is formed, is not so clearly distinguishable. We find the Diet of Germany has in some instances the power of legislation on individuals. We find the United States of America have it in an extensive degree in the case of piracies.

Let us now review the powers with which we are invested. We are appointed for the sole and express purpose of revising the Confederation, and to alter or amend it, so as to render it effectual for the purposes of a good government. Those who suppose it must be federal, lay great stress on the terms *sole* and *express*, as if these words intended a confinement to a federal government; when the manifest import is no more than that the institution of a good government must be the sole and express object of your deliberations. Nor can we suppose an annihilation of our powers by forming a national government, as many of the States have made in their constitutions no provision for any alteration; and thus much I can say for the State I have the honor to represent, that when our credentials were under consideration in the Senate, some members were for inserting a restriction in the powers, to prevent an encroachment on the Constitution: it was answered by others, and thereupon the resolve carried on the credentials, that it might abridge some of the constitutional powers of the State, and that possibly in the formation of a new Union it would be found necessary. This appears reasonable, and therefore leaves us at liberty to form such a national government as we think best adapted for the good of the whole. I have therefore no difficulty as to the extent of our powers, nor do I feel myself restrained in the exercise of my judgment under them. We can only propose and recommend — the power of ratifying or rejecting is still in the States. But on this great question I am still greatly embarrassed. I have before observed my apprehension of the inefficacy of either plan, and I have great doubts whether a more energetic government can pervade this wide and extensive country. I shall now show that both plans are materially defective.

(1) A good government ought to be constant, and ought to contain an active principle. (2) Utility and necessity. (3) An habitual sense of obligation. (4) Force. (5) Influence.

I hold it, that different societies have all different views and interests to pursue, and always prefer local to general concerns.

For example: New York legislature made an external compliance lately to a requisition of Congress; but do they not at the same time counteract their compliance by gratifying the local objects of the State so as to defeat their concession? And this will ever be the case. Men always love power, and States will prefer their particular concerns to the general welfare; and as the States become large and important, will they not be less attentive to the general government? What in process of time will Virginia be? She contains now half a million of inhabitants — in twenty-five years she will double the number. Feeling her own weight and importance, must she not become indifferent to the concerns of the Union? And where, in such a situation, will be found national attachment to the general government?

By *force,* I mean the *coercion* of law and the coercion of arms. Will this remark apply to the power intended to be vested in the government to be instituted by their plan? A delinquent must be compelled to obedience by force of arms. How is this to be done? If you are unsuccessful, a dissolution of your government must be the consequence; and in that case the individual legislatures will reassume their powers; nay, will not the interest of the States be thrown into the State governments?

By *influence,* I mean the regular weight and support it will receive from those who will find it their interest to support a government intended to preserve the peace and happiness of the community of the whole. The State governments, by either plan, will exert the means to counteract it. They have their State judges and militia all combined to support their State interests; and these will be influenced to oppose a national government. Either plan is therefore precarious. The national government cannot long exist when opposed by such a weighty rival. The experience of ancient and modern confederacies evince this point, and throw considerable light on the subject. The Amphictyonic Council of Greece had a right to require of its members troops, money, and the force of the country. Were they obeyed in the exercise of those powers? Could they preserve the peace of the greater States and Republics? or where were they obeyed? History shows that their decrees were disregarded, and that the stronger States, regardless of their power, gave law to the lesser.

Let us examine the federal institution of Germany. It was instituted upon the laudable principle of securing the independency of the several States of which it was composed, and to protect them against foreign invasion. Has it answered these good intentions? Do we not see that their councils are weak and distracted, and that it cannot prevent the wars and confusions which the respective electors carry on against each other? The Swiss cantons, or the Helvetic union, are equally inefficient.

Such are the lessons which the experience of others affords us, and from whence results the evident conclusion that all federal governments are weak and distracted. To avoid the evils deducible from these observations we must establish a general and national

government, completely sovereign, and annihilate the State distinctions and State operations; and unless we do this, no good can be answered. What does the Jersey plan propose? It surely has not this for its object. By this we grant the regulation of trade and a more effectual collection of the revenue, and some partial duties. These, at five or ten per cent., would only perhaps amount to a fund to discharge the debt of the corporation.

Let us take a review of the variety of important objects, which must necessarily engage the attention of a national government. You have to protect your rights against Canada on the north, Spain on the south, and your western frontier against the savages. You have to adopt necessary plans for the settlement of your frontiers, and to institute the mode in which settlements and good government are to be made.

How is the expense of supporting and regulating these important matters to be defrayed? By requisition on the States, according to the Jersey plan? Will this do it? We have already found it ineffectual. Let one State prove delinquent, and it will encourage others to follow the example; and thus the whole will fail. And what is the standard to quota among the States their respective proportions? Can lands be the standard? How would that apply between Russia and Holland? Compare Pennsylvania with North Carolina, or Connecticut with New York. Does not commerce or industry in the one or other make a great disparity between these different countries, and may not the comparative value of the States from these circumstances make an unequal disproportion when the data is numbers? I therefore conclude that either system would ultimately destroy the Confederation, or any other government which is established on such fallacious principles. Perhaps imposts, taxes on specific articles, would produce a more equal system of drawing a revenue.

Another objection against the Jersey plan is, the unequal representation. Can the great States consent to this? If they did it would eventually work its own destruction. How are forces to be raised by the Jersey plan? By quotas? Will the States comply with the requisition? As much as they will with the taxes.

Examine the present Confederation, and it is evident they can raise no troops nor equip vessels before war is actually declared. They cannot therefore take any preparatory measure before an enemy is at your door. How unwise and inadequate their powers! and this must ever be the case when you attempt to define powers. — Something will always be wanting. Congress, by being annually elected and subject to recall, will ever come with the prejudices of their States rather than the good of the Union. Add therefore additional powers to a body thus organized, and you establish a sovereignty of the worst kind, consisting of a single body. Where are the checks? None. They must either prevail over the State governments, or the prevalence of the State governments must end in their dissolution. This is a conclusive objection to the Jersey plan.

Such are the insuperable objections to both plans: and what is to be done on this occasion? I confess I am at a loss. I foresee the difficulty on a consolidated plan of drawing a representation from so extensive a continent to one place. What can be the inducements for gentlemen to come six hundred miles to a national legislature? The expense would at least amount to £100,000. This, however, can be no conclusive objection if it eventuates in an extinction of State governments. The burthen of the latter would be saved, and the expense then would not be great. State distinctions would be found unnecessary, and yet I confess, to carry government to the extremities, the State governments reduced to corporations, and with very limited powers, might be necessary, and the expense of the national government become less burthensome.

Yet, I confess, I see great difficulty of drawing forth a good representation. What, for example, will be the inducements for gentlemen of fortune and abilities to leave their houses and business to attend annually and long? It cannot be the wages; for these, I presume, must be small. Will not the power, therefore, be thrown into the hands of the demagogue or middling politician, who, for the sake of a small stipend and the hopes of advancement, will offer himself as a candidate, and the real men of weight and influence, by remaining at home, add strength to the State governments? I am at a loss to know what must be done — I despair that a republican form of government can remove the difficulties. Whatever may be my opinion, I would hold it, however, unwise to change that form of government. I believe the British government forms the best model the world ever produced, and such has been its progress in the minds of the many, that this truth gradually gains ground. This government has for its object public strength and individual security. It is said with us to be unattainable. If it was once formed it would maintain itself. All communities divide themselves into the few and the many. The first are the rich and well born, the other the mass of the people. The voice of the people has been said to be the voice of God; and however generally this maxim has been quoted and believed, it is not true in fact. The people are turbulent and changing; they seldom judge or determine right. Give therefore to the first class a distinct, permanent share in the government. They will check the unsteadiness of the second, and as they cannot receive any advantage by a change, they therefore will ever maintain good government. Can a democratic assembly, who annually revolve in the mass of the people, be supposed steadily to pursue the public good? Nothing but a permanent body can check the imprudence of democracy. Their turbulent and uncontrouling disposition requires checks. The Senate of New York, although chosen for four years, we have found to be inefficient. Will, on the Virginia plan, a continuance of seven years do it? It is admitted that you cannot have a good executive upon a democratic plan. See the excellency of the British executive — he is placed above temptation — he can have no distinct interests from the public welfare. Nothing short of such an executive can be efficient.

The weak side of a republican government is the danger of foreign influence. This is unavoidable, unless it is so constructed as to bring forward its first characters in its support. I am therefore for a general government, yet would wish to go the full length of republican principles.

Let one body of the Legislature be constituted during good behaviour or life.

Let one Executive be appointed who dares execute his powers.

It may be asked is this a republican system? It is strictly so, as long as they remain elective.

And let me observe, that an Executive is less dangerous to the liberties of the people when in office during life, than for seven years.

It may be said this constitutes an elective monarchy? Pray what is a monarchy? May not the Governors of the respective States be considered in that light? But by making the Executive subject to impeachment, the term monarchy cannot apply. These elective monarchs have produced tumults in Rome, and are equally dangerous to peace in Poland; but this cannot apply to the mode in which I would propose the election. Let electors be appointed in each of the States to elect the Executive — [*Here Mr. H. produced his plan, a copy whereof is hereunto annexed*] to consist of two branches — and I would give them the unlimited power of passing *all laws* without exception. The Assembly to be elected for three years by the people in districts — the Senate to be elected by electors to be chosen for that purpose by the people, and to remain in office during life. The Executive to have the power of negativing all laws — to make war or peace with the advice of the Senate — to make treaties with their advice, but to have the sole direction of all military operations, and to send ambassadors and appoint all military officers, and to pardon all offenders, treason excepted, unless by advice of the Senate. On his death or removal, the President of the Senate to officiate, with the same powers, until another is elected. Supreme judicial officers to be appointed by the Executive and the Senate. The Legislature to appoint courts in each State, so as to make the State governments unnecessary to it.

All State laws to be absolutely void which contravene the general laws. An officer to be appointed in each State to have a negative on all State laws. All the militia and the appointment of officers to be under the national government.

I confess that this plan and that from Virginia are very remote from the idea of the people. Perhaps the Jersey plan is nearest their expectation. But the people are gradually ripening in their opinions of government — they begin to be tired of an excess of democracy — and what even is the Virginia plan, but *pork still, with a little change of the sauce.*

XIII

SELECTIONS FROM THE FEDERALIST

In the campaign for the ratification of the Federal Constitution, the pamphleteer played an important part. It is one of the weapons used by Anglo-Saxon peoples in settling their controversies, whether political, religious, or even personal. The issue will inevitably call forth an epidemic of pamphlets designed to sustain or to upset a given institution, policy, or order. The most notable pamphlet series written in defense of the Constitution, and in favor of its ratification, was the *Federalist*. These articles were first published in the city of New York in the *Independent Journal*, the *Packet*, and the *Daily Advertiser*. The authors were Alexander Hamilton, James Madison, and John Jay. The papers were collected and published in two small volumes in 1788. "The immediate object," according to Madison, "of them was to vindicate and recommend the new Constitution to the State of New York, whose ratification of the instrument was doubtful as well as important." The project originated with Mr. Hamilton. At first the letters were "addressed to the people of New York under the signature of a citizen of New York." Later the papers were published under the signature of "Publius," because one of the authors was not a citizen of New York, and because the papers soon received a general circulation throughout the States. The series did not attain the "immediate object" with marked success. It soon became the leading treatise on the Constitution of the United States, and has been drawn upon largely by scholars, lawyers, teachers, public officials and judges for interpretations of our constitutional system. The influence of the *Federalist* on the reasoning, and in some cases, on the language of Chief Justice Marshall, is found in some of his notable decisions.

The position of primacy held by the writers of the *Federalist* should not close our eyes to the work of other defenders and opponents of the Constitution. Some of these men expressed their views through speeches, through pamphlets, and in the state conventions of ratification. Elbridge Gerry, Noah Webster, Peletiah Webster, James Wilson, John Dickinson, Edmund Randolph, Richard Henry Lee, George Mason, and James Iredell participated in the great controversy. The debates of the Virginia ratifying convention shed much light on the issues of the ratification movement. These debates included discussions by Patrick Henry, John Marshall, George Mason, James Madison, and George Wythe. The excerpts which follow are chosen because of their explanation of the nature of the constitutional system rather than for their influence in inducing the ratification of the Constitution. In this, as in many other similar movements, the best arguments often fell upon the least fertile soil.

(*a*) *The Federalist on Democracies and Republics.*[1]

From this view of the subject it may be concluded that a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert result from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is such that democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths. Theoretic politicians, who have patronized this species of government, have erroneously supposed that by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized in their possessions, their opinions, and their passions.

A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking. Let us examine the points on which it varies from pure democracy, and we shall comprehend both the nature of the cure and the efficacy which it must derive from the Union.

The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended.

(*b*) *The Federalist on the basis of representation.*[2]

The idea of an actual representation of all classes of the people by persons of each class is altogether visionary. Unless it were expressly provided in the Constitution that each different occupation should send one or more members, the thing would never take place in practice. Mechanics and manufacturers will always be inclined, with few exceptions, to give their votes to merchants in preference to persons of their own professions or trades. Those discerning citizens are well aware that the mechanic and manufacturing arts furnish the materials of mercantile enterprise and industry. Many of them, indeed, are immediately connected with the operations of commerce. They know that the merchant is their natural patron and friend; and they are aware that, however great the confidence they may justly feel in their own good sense, their interests can be more effectually promoted by the merchant than by themselves. They are sensible that their habits in life have not been such as to give them those acquired endowments without which, in a deliberative assembly, the greatest natural abilities are for the most part

[1] *Federalist* (Ford ed.), No. 10. [2] *Federalist* (Ford ed.), No. 56.

useless; and that the influence and weight and superior acquirements of the merchants render them more equal to a contest with any spirit which might happen to infuse itself into the public councils, unfriendly to the manufacturing and trading interests. These considerations, and many others that might be mentioned, prove, and experience confirms it, that artisans and manufacturers will commonly be disposed to bestow their votes upon merchants and those whom they recommend. We must therefore consider merchants as the natural representatives of all these classes of the community.

With regard to the learned professions little need be observed; they truly form no distinct interest in society, and, according to their situation and talents, will be indiscriminately the objects of the confidence and choice of each other, and of other parts of the community.

Nothing remains but the landed interest; and in this, in a political view, and particularly in relation to taxes, I take to be perfectly united, from the wealthiest landlord down to the poorest tenant. No tax can be laid on land which will not affect the proprietor of a million acres as well as the proprietor of a single acre. Every landholder will therefore have a common interest to keep the taxes on land as low as possible; and common interest may always be reckoned upon as the surest bond of sympathy. . . . Where the qualifications of the electors are the same, where they have to choose from a small or a large number, their votes will fall upon those in whom they have the most confidence, whether these happen to be men of large fortunes, or of moderate property, or of no property at all.

It is said to be necessary that all classes of citizens should have some of their own number in the representative body in order that their feelings and interests may be the better understood and attended to. But we have seen that this will never happen under any arrangement that leaves the votes of the people free. Where this is the case, the representative body, with too few exceptions to have any influence on the spirit of the government, will be composed of landholders, merchants, and men of the learned professions. . . .

(c) *The Federalist on the republican character of the Constitution.*[3]

The first question that offers itself is whether the general form and aspect of the government be strictly republican. It is evident that no other form would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with that honorable determination which animates every votary of freedom to rest all our political experiments on the capacity of mankind for self-government. If the plan of the convention, therefore, be found to depart from the republican character, its advocates must abandon it as no longer defensible.

What, then, are the distinctive characters of the republican

[3] *Federalist* (Ford ed.), No. 39.

form? Were an answer to this question to be sought, not by recurring to principles, but in the application of the term by political writers to the constitutions of different States, no satisfactory one would ever be found. Holland, in which no particle of the supreme authority is derived from the people, has passed almost universally under the denomination of a republic. The same title has been bestowed on Venice, where absolute power over the great body of the people is exercised, in the most absolute manner, by a small body of hereditary nobles. Poland, which is a mixture of aristocracy and of monarchy in their worst forms, has been dignified with the same appellation. The government of England, which has one republican branch only, combined with an hereditary aristocracy and monarchy, has, with equal impropriety, been frequently placed on the list of republics. These examples, which are nearly as dissimilar to each other as to a genuine republic, show the extreme inaccuracy with which the term has been used in political disquisitions.

If we resort for a criterion to the different principles on which different forms of government are established, we may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior. It is *essential* to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans and claim for their government the honorable title of republic. It is *sufficient* for such a government that the persons administering it be appointed either directly or indirectly, by the people; and that they hold their appointments by either of the tenures just specified; otherwise every government in the United States, as well as every other popular government that has been or can be well organized or well executed, would be degraded from the republican character. According to the constitution of every State in the Union, some or other of the officers of government are appointed indirectly only by the people. According to most of them, the chief magistrate himself is so appointed. And according to one, this mode of appointment is extended to one of the co-ordinate branches of the legislature. According to all the constitutions, also, the tenure of the highest offices is extended to a definite period, and in many instances, both within the legislative and executive departments, to a period of years. According to the provisions of most of the constitutions, again, as well as according to the most respectable and received opinons on the subject, the members of the judiciary department are to retain their offices by the firm tenure of good behavior.

On comparing the Constitution planned by the convention with the standard here fixed, we perceive at once that it is, in the most rigid sense, conformable to it. The House of Representatives, like

that of one branch at least of all the State legislatures, is elected immediately by the great body of the people. The Senate, like the present Congress and the Senate of Maryland, derives its appointment indirectly from the people. The President is indirectly derived from the choice of the people, according to the example in most of the States. Even the judges, with all other officers of the Union, will, as in the several States, be the choice, though a remote choice, of the people themselves. The duration of the appointments is equally conformable to the republican standard and to the model of State constitutions. The House of Representatives is periodically elective, as in all the States; and for the period of two years, as in the State of South Carolina. The Senate is elective, for the period of six years; which is but one year more than the period of the Senate of Maryland, and but two more than that of the Senates of New York and Virginia. The President is to continue in office for the period of four years; as in New York and Delaware the chief magistrate is elected for three years, and in South Carolina for two years. In the other States the election is annual. In several of the States, however, no constitutional provision is made for the impeachment of the chief magistrate. And in Delaware and Virginia he is not impeachable till out of office. The President of the United States is impeachable at any time during his continuance in office. The tenure by which the judges are to hold their places is, as it unquestionably ought to be, that of good behavior. The tenure of the ministerial offices generally will be a subject of legal regulation, conformably to the reason of the case and the example of the State constitutions.

Could any further proof be required of the republican complexion of this system, the most decisive one might be found in its absolute prohibition of titles of nobility, both under the federal and the State governments; and in its express guaranty of the republican form to each of the latter.

"But it was not sufficient," say the adversaries of the proposed Constitution, "for the convention to adhere to the republican form. They ought, with equal care, to have preserved the *federal* form, which regards the Union as a *Confederacy* of sovereign states; instead of which, they have framed a *national* government, which regards the Union as a *consolidation* of the States." And it is asked by what authority this bold and radical innovation was undertaken? The handle which has been made of this objection requires that it should be examined with some precision.

Without inquiring into the accuracy of the distinction on which the objection is founded, it will be necessary to a just estimate of its force, first, to ascertain the real character of the government in question; secondly, to inquire how far the convention were authorized to propose such a government; and thirdly, how far the duty they owed to their country could supply any defect of regular authority.

First — In order to ascertain the real character of the government, it may be considered in relation to the foundation on which

it is to be established; to the sources from which its ordinary powers are to be drawn; to the operation of those powers; to the extent of them; and to the authority by which future changes in the government are to be introduced.

On examining the first relation, it appears, on one hand, that the Constitution is to be founded on the assent and ratification of the people of America, given by deputies elected for the special purpose; but, on the other, that this assent and ratification is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong. It is to be the assent and ratification of the several States, derived from the supreme authority in each State — the authority of the people themselves. The act, therefore, establishing the Constitution, will not be a *national,* but a *federal* act.

That it will be federal and not a national act, as these terms are understood by the objectors — the act of the people, as forming so many independent States, not as forming one aggregate nation — is obvious from this single consideration, that it is to result neither from the decision of a *majority* of the people of the Union, nor from that of a *majority* of the States. It must result from the *unanimous* assent of the several States that are parties to it, differing no otherwise from their ordinary assent than in its being expressed, not by the legislative authority, but by that of the people themselves. Were the people regarded in this transaction as forming one nation, the will of the majority of the whole people of the United States would bind the minority in the same manner as the majority in each State must bind the minority; and the will of the majority must be determined, either by a comparison of the individual votes, or by considering the will of the majority of the States as evidence of the will of a majority of the people of the United States. Neither of these rules has been adopted. Each State, in ratifying the Constitution, is considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act. In this relation, then, the new Constitution will, if established, be a *federal* and not a *national* constitution.

The next relation is to the sources from which the ordinary powers of government are to be derived. The House of Representatives will derive its powers from the people of America; and the people will be represented in the same proportion, and on the same principle, as they are in the legislature of a particular State. So far the government is *national,* not *federal.* The Senate, on the other hand, will derive its powers from the States, as political and coequal societies; and these will be represented on the principle of equality in the Senate, as they now are in the existing Congress. So far the government is *federal,* not *national.* The executive power will be derived from a very compound source. The immediate election of the President is to be made by the States in their political characters. The votes allotted to them are in a compound ratio, which considers them partly as distinct and coequal societies, partly as un-

equal members of the same society. The eventual election, again, is to be made by that branch of the legislature which consists of the national representatives; but in this particular act they are to be thrown into the form of individual delegations, from so many distinct and coequal bodies politic. From this aspect of the government it appears to be of a mixed character, presenting at least as many *federal* as *national* features.

The difference between a federal and national government, as it relates to the *operation of the government,* is supposed to consist in this, that in the former the powers operate on the political bodies composing the Confederacy, in their political capacities; in the latter, on the individual citizens composing the nation, in their individual capacities. On trying the Constitution by this criterion, it falls under the *national,* not the *federal* character; though perhaps not so completely as has been understood. In several cases, and particularly in the trial of controversies to which States may be parties, they must be viewed and proceeded against in their collective and political capacities only. So far the national countenance of the government on this side seems to be disfigured by a few federal features. But this blemish is perhaps unavoidable in any plan; and the operation of the government on the people, in their individual capacities, in its ordinary and most essential proceedings, may, on the whole, designate it, in this relation, a *national* government.

But if the government be national with regard to the *operation* of its powers, it changes its aspect again when we contemplate it in relation to the *extent* of its powers. The idea of a national government involves in it not only an authority over the individual citizens, but an indefinite supremacy over all persons and things, so far as they are objects of lawful government. Among a people consolidated into one nation, this supremacy is completely vested in the national legislature. Among communities united for particular purposes, it is vested partly in the general and partly in the municipal legislatures. In the former case, all local authorities are subordinate to the supreme; and may be controlled, directed, or abolished by it at pleasure. In the latter, the local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them within its own sphere. In this relation, then, the proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects. It is true that, in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide is to be established under the general government. But this does not change the principle of the case. The decision is to be impartially made, according to the rules of the Constitution; and all the usual and most effectual precautions are taken to secure this impartiality. Some such tribunal is clearly essential to prevent an appeal to the sword

and a dissolution of the compact; and that it ought to be established under the general rather than under the local governments, or, to speak more properly, that it could be safely established under the first alone, is a position not likely to be combated.

If we try the Constitution by its last relation to the authority by which amendments are to be made, we find it neither wholly *national* nor wholly *federal*. Were it wholly national, the supreme and ultimate authority would reside in the *majority* of the people of the Union; and this authority would be competent at all times, like that of a majority of every national society, to alter or abolish its established government. Were it wholly federal, on the other hand, the concurrence of each State in the Union would be essential to every alteration that would be binding on all. The mode provided by the plan of the convention is not founded on either of these principles. In requiring more than a majority, and particularly in computing the proportion by *States*, not by *citizens*, it departs from the *national* and advances toward the *federal* character; in rendering the concurrence of less than the whole number of States sufficient, it loses again the *federal* and partakes of the *national* character.

The proposed Constitution, therefore, is, in strictness, neither a national nor a federal Constitution, but a composition of both. In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal and partly national; in the operation of these powers, it is national, not federal; in the extent of them, again, it is federal, not national; and, finally, in the authoritative mode of introducing amendments, it is neither wholly federal nor wholly national.

(*d*) *The Federalist on the Separation of Powers.*[4]

It is agreed, on all sides, that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident that one of them ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers. It will not be denied that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task is to provide some practical security for each against the invasion of the others. What this security ought to be, is the great problem to be solved.

Will it be sufficient to mark with precision the boundaries of these departments in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power? This is the security which appears to have been principally relied on by the compilers of most of the American constitutions. But

[4] *Federalist* (Ford ed.), No. 48.

experience assures us that the efficacy of the provision has been greatly overrated, and that some more adequate defense is indispensably necessary for the more feeble, against the more powerful members of the government. The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.

The founders of our republics have so much merit for the wisdom which they have displayed that no task can be less pleasing than that of pointing out the errors into which they have fallen. A respect for truth, however, obliges us to remark that they seem never for a moment to have turned their eyes from the danger to liberty from the overgrown and all-grasping prerogative of an hereditary magistrate, supported and fortified by an hereditary branch of the legislative authority. They seem never to have recollected the danger from legislative usurpations, which, by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations.

In a government where numerous and extensive prerogatives are placed in the hands of an hereditary monarch, the executive department is very justly regarded as the source of danger, and watched with all the jealousy which a zeal for liberty ought to inspire. In a democracy, where a multitude of people exercise in person the legislative functions, and are continually exposed, by their incapacity for regular deliberation and concerted measures, to the ambitious intrigues of their executive magistrates, tyranny may well be apprehended, on some favorable emergency, to start up in the same quarter. But in a representative republic, where the executive magistracy is carefully limited, both in the extent and the duration of its power; and where the legislative power is exercised by an assembly, which is inspired, by a supposed influence over the people, with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.

The legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments. It is not unfrequently a question of real nicety in legislative bodies, whether the operation of a particular measure will, or will not, extend beyond the legislative sphere. On the other side, the executive power being restrained within a narrower compass, and being more simple in its nature, and the judiciary being described by landmarks still less uncertain, projects of usurpation by either of these departments would immediately betray and defeat themselves. Nor is this all: as the legislative department alone has access to the pockets of the people, and has in some constitutions

full discretion, and in all a prevailing influence over the pecuniary rewards of those who fill the other departments, a dependence is thus created in the latter which gives still greater facility to encroachments of the former.

(*e*) *The Federalist on Checks and Balances.*[5]

In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own, and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others. Were this principle rigorously adhered to, it would require that all the appointments for the supreme executive, legislative, and judiciary magistracies should be drawn from the same fountain of authority, the people, through channels having no communication whatever with one another. Perhaps such a plan of constructing the several departments would be less difficult in practice than it may in contemplation appear. Some difficulties, however, and some additional expense would attend the execution of it. Some deviations, therefore, from the principle must be admitted. In the constitution of the judiciary department in particular, it might be inexpedient to insist rigorously on the principle: first, because peculiar qualifications being essential in the members, the primary considerations ought to be to select that mode of choice which best secures these qualifications; secondly, because the permanent tenure by which the appointments are held in that department, must soon destroy all sense of dependence on the authority conferring them.

It is equally evident that the members of each department should be as little dependent as possible on those of the others for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal.

But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men

[5] *Federalist* (Ford ed.), No. 51.

over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other — that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State.

(*f*) *The Federalist on a strong Executive.*[6]

There is an idea, which is not without its advocates, that a vigorous Executive is inconsistent with the genius of republican government. The enlightened well-wishers to this species of government must at least hope that the supposition is destitute of foundation; since they can never admit its truth, without at the same time admitting the condemnation of their own principles. Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy. Every man the least conversant in Roman history knows how often that republic was obliged to take refuge in the absolute power of a single man, under the formidable title of Dictator, as well against the intrigues of ambitious individuals who aspired to the tyranny and the seditions of whole classes of the community whose conduct theatened the existence of all government, as against the invasions of external enemies who menaced the conquest and destruction of Rome.

There can be no need, however, to multiply arguments or examples on this head. A feeble Executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be in practice a bad government.

Taking it for granted, therefore, that all men of sense will agree in the necessity of an energetic Executive, it will only remain to inquire, What are the ingredients which constitute this energy? How far can they be combined with those other ingredients which constitute safety, in the republican sense? And how far does this com-

[6] *Federalist* (Ford ed.), No. 70.

bination characterize the plan which has been reported by the convention?

The ingredients which constitute energy in the Executive are, first, unity; secondly, duration; thirdly, an adequate provision for its support; fourthly, competent powers.

The ingredients which constitute safety in the republican sense are, first, a due dependence on the people; secondly, a due responsibility.

Those politicians and statesmen who have been the most celebrated for the soundness of their principles and for the justice of their views have declared in favor of a single Executive and a numerous legislature. They have, with great propriety, considered energy as the most necessary qualification of the former, and have regarded this as most applicable to power in a single hand; while they have, with equal propriety, considered the latter as best adapted to deliberation and wisdom, and best calculated to conciliate the confidence of the people and to secure their privileges and interests.

That unity is conducive to energy will not be disputed. Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased these qualities will be diminished.

This unity may be destroyed in two ways: either by vesting the power in two or more magistrates of equal dignity and authority; or by vesting it ostensibly in one man, subject, in whole or in part, to the control and co-operation of others, in the capacity of counselors to him. Of the first, the two Consuls of Rome may serve as an example; of the last, we shall find examples in the constitutions of several of the States. New York and New Jersey, if I recollect right, are the only States which have intrusted the executive authority wholly to single men. Both these methods of destroying the unity of the Executive have their partisans; but the votaries of an executive council are the most numerous. They are both liable, if not to equal, to similar objections, and may in most lights be examined in conjunction.

XIV

BRIEF BIOGRAPHICAL NOTES ON THE MEMBERS OF THE CONSTITUTIONAL CONVENTION[1]

ABRAHAM BALDWIN, Ga., 1754–1807. Minister; Graduate of Yale, 1772; Chaplain in the Revolutionary Army; Member of the State Legislature, 1784; Member of the Confederation Congress, 1786–1788; U. S. Congressman, 1789–1799; United States Senator, 1799–1807.

[1] Additional facts may be found in the following books: Elliott, *Biographical Story of the Constitution;* Farrand, *Framing of the Constitution;* Beard, *Economic Interpretation of the Constitution.*

RICHARD BASSETT, Del., (d. 1815) Lawyer; United States Senator, 1789–1793; Chief Justice of the Court of Common Pleas of the State of Delaware, 1793–1798; Governor of Delaware, 1799–1801; 1801 — *midnight* appointee of Adams as United States Circuit Judge.

GUNNING, BEDFORD, Del., 1747–1812. Lawyer; Aide-de-Camp to Washington; Delegate to the Confederation Congress, 1783–1786; Attorney-General of Delaware; United States District Judge for Delaware.

JOHN BLAIR, Va., 1732–1800. Lawyer; Judge of the Va. Court of Appeals, 1777–1780; Judge of the Va. High Court of Chancery; Associate Justice in the United States Supreme Court, 1789–1796.

WILLIAM BLOUNT, N. C., 1749–1800. Land speculator; Member of the North Carolina Legislature; Member of the Confederation Congress, 1783–1784; Governor of the Territory of the United States south of the Ohio, 1790–1796; United States Senator from Tennessee, 1796–1798; State Senator in Tennessee, 1798–1800.

DAVID BREARLEY, N. J., 1745–1790. Lawyer; Member of the army of the Revolution; Chief Justice of New Jersey, 1779–1789; United States District Judge, 1789–1790.

JACOB BROOM, Del. Owner of stock in Cotton Mills and in the Insurance Company of North America; Postmaster at Wilmington, Del.

PIERCE BUTLER, S. C., 1744–1822. Slaveholder; Delegate to the Confederation Congress, 1787; Stockholder and Director of the First United States Bank; United States Senator from South Carolina, 1789–1796 and 1802–1804.

DANIEL CARROLL, Md. Owner of the present site of Washington, D. C.; United States Congressman, 1789–1791; Commissioner for the laying out of the District of Columbia.

GEORGE CLYMER, Pa., 1739–1813. Merchant; 1775, Continental Treasurer; Member of the Continental Congress, 1776, 1777, 1780; Signer of the Declaration of Independence; Congressman, 1789–1791; Collector of Internal Revenue, 1791–1793.

WILLIAM R. DAVIE, N. C., 1756–1820. Lawyer; Commissary General of the Southern Army; Ambassador to France, 1799; Special Commissioner to negotiate with the Tuscaroras.

JONATHAN DAYTON, N. J., 1760–1824. Land speculator; Member of the Revolutionary Army; Member and Speaker of the State Legislature; Congressman, 1791–1799; Speaker of the House of Representatives, 1795–1799; United States Senator, 1799–1805.

JOHN DICKINSON, Del., 1732–1808. Lawyer; Member of the Stamp Act Congress; Member of the First Continental Congress; Member of the Revolutionary Army; President of Delaware, 1781; President of Pennsylvania, 1782–1785.

OLIVER ELLSWORTH, Conn., 1745–1807. Lawyer; Delegate to the Confederation Congress; Member of the Governor's Council,

1784; Judge of the Conn. Supreme Court, 1784–1787; United States Senator, 1789–1796; Chief Justice Supreme Court of the U. S., 1796–1799; Envoy Extraordinary to France, 1799.

WILLIAM FEW, Ga. Lawyer and farmer; worth about $100,000; United States Senator, 1789–1793; Commissioner of Loans, 1802–1810; moved to New York State in 1799; Member of the New York Legislature, 1802–1805.

THOMAS FITZSIMMONS, Pa. Merchant; Director of the Bank of North America; Congressman, 1789–1795.

BENJAMIN FRANKLIN, Pa., 1706–1790. Statesman; known all over the world as a scientist and philosopher; 1753, Deputy Postmaster General of the British Colonies; Member of the Albany Congress, 1754; Agent for Pennsylvania in London, England, 1757–1762 and from 1764 to the Revolution; Signer of the Declaration of Independence; Minister or Commissioner from the United States to France, 1776–1785; Negotiated and signed treaty of peace with Great Britain, 1782–1783; President of Pennsylvania, 1785–1787; Philanthropist.

ELBRIDGE GERRY, Mass., 1744–1814. Merchant; Member Mass. Colonial House of Representatives, 1772–1775; Delegate to the Continental and Confederate Congresses, 1776–1780 and 1783–1785; Signer of the Declaration of Independence; Congressman, 1789–1793; Special Commissioner to France, 1797; Governor of Massachusetts, 1810 and 1811; Vice-President of the U. S., 1813–14; believed that the United States had too much democracy.

NICHOLAS GILMAN, N. H., 1755–1814. Public Serviceman; Adjutant General during the Revolution; Delegate to Confederation Congress, 1786–88; Congressman, 1789–1797; United States Senator, 1805–1814.

NATHANIEL GORHAM, Mass. Merchant and land speculator; owned $1,000,000 worth of western lands; owned twenty shares of stock in the First United States Bank; opposed to any property qualifications for voting.

ALEXANDER HAMILTON, N. Y., 1757–1804. Lawyer; most brilliant man in the convention; believed in aristocracy; member of Washington's staff; Member of Confederation Congress, 1782–1783; author of the *Federalist;* Secretary of the Treasury, 1789–1795; Inspector General of the U. S. Army, 1798.

WILLIAM C. HOUSTON, N. J. Professor; Clerk of the Supreme Court of New Jersey; believed in democracy; took little part in the convention.

WILLIAM HOUSTON, Ga. Lawyer; Son of a royalist; supported the Constitution but failed to sign the document.

JARED INGERSOLL, Pa. 1749–1822. Lawyer; Member of Continental Congress, 1780–1781; Attorney General of Pennsylvania; U. S. District Attorney for Eastern Pennsylvania; defeated as Federalist candidate for Vice-President in 1812.

DANIEL of ST. THOMAS JENIFER, Md. Slaveholder. (d. 1790.)

WILLIAM S. JOHNSON, Conn., 1727–1819. Lawyer; Conn. delegate to the Stamp Act Congress; London agent of the Colony 1766–1771; Judge of the Conn. Supreme Court, 1772–1774; conscientious objector during the Revolution; Member of the Confederation Congress, 1784–1787; United States Senator, 1789–1791; President of Columbia College, 1791–1800.

RUFUS KING, Mass., 1755–1827. Public Serviceman and business man; Member of Massachusetts Legislature; Delegate to Continental Congress; 1789–1796, United States Senator from New York; Minister to England, 1796–1803; Federalist candidate for Vice-President, 1804; Federalist candidate for Governor of New York, 1815; last Federalist candidate for the Presidency, 1816; United States Senator from New York, 1813–1825; Minister to England, 1825–1826.

JOHN LANGDON, N. H., 1741–1819. Merchant; Delegate to Continental Congress, 1775, 1776, 1783; member of the Revolutionary army, gave his estate to the cause; United States Senator, 1789–1801; Governor of New Hampshire, 1805–1809, 1810, 1811.

JOHN LANSING, N. Y., 1754–1829. Lawyer; Delegate to the Congress of the Confederacy, 1784–1788; Mayor of Albany; Justice of the New York Supreme Court, 1790–1798; Chief Justice, 1798–1801; Chancellor, 1801–1814; failed to sign the Constitution.

WILLIAM LIVINGSTON, N. J., 1723–1790. Lawyer; Delegate to the Continental Congress, 1774–1776; Governor of New Jersey, 1776–1790.

JAMES McCLUNG, Va. Physician; had no use for state legislatures; director of the First Bank of the United States.

JAMES McHENRY, Md., 1753–1816. Capitalist; Surgeon; opposed to representative institutions; Surgeon in the Revolutionary War; State Senator 1781–1786; Delegate to the Congress of the Confederation, 1783–1786; Secretary of War, 1796–1801.

JAMES MADISON, Va., 1751–1836. Lawyer; "THE FATHER OF THE CONSTITUTION"; a student of politics and political theory; *Notes* on the Convention; Member of the Virginia Convention of 1776; Member of the Continental Congress, 1780–1784; Member of the Virginia Assembly, 1784–1787; Member of the Alexandria Conference and Annapolis Conference; helped Hamilton with the *Federalist;* Congressman, 1789–1797; Secretary of State, 1801–1809; President of the United States, 1809–1817.

ALEXANDER MARTIN, N. C. Slaveholder and lawyer; failed to sign the Constitution or to take part in discussion; elected Governor of North Carolina, 1792; United States Senator, 1793–1799.

LUTHER MARTIN, Md., 1744–1826. Lawyer; Attorney General of Maryland; Member of the Congress of the Confederation, 1784–1785; failed to sign the Constitution and fought its ratification.

GEORGE MASON, Va., 1725–1792. Slaveholder; Member of the Virginia Assembly; slavery opponent in the Convention; refused to sign the Constitution and fought its ratification; elected United States Senator in 1789 but refused to serve.

JOHN FRANCIS MERCER, Md., 1759–1821. Lawyer; fought in the Revolutionary army; Delegate in the Congress of the Confederation, 1782–1785; Congressman, 1791–1795; Governor of Maryland, 1801–1803; opposed to the popular election of national officers; refused to sign the Constitution.

THOMAS MIFFLIN, Pa., 1744–1800. Merchant; Member of the Pennsylvania Legislature; Delegate to the First Continental Congress; Quartermaster General of the Revolutionary army; Member of the Board of War; President of the Congress of the Confederation, 1783; Governor of Pennsylvania, 1790–1799.

GOUVERNEUR MORRIS, Pa., 1752–1816. Lawyer; Member of New York Provincial Congress; Member of the Continental Congress; Assistant Superintendent of Finance during the Revolution; Commissioner to England, 1789–1792; Minister to France, 1792–1799; United States Senator, 1800–1803; distrusted democratic institutions.

ROBERT MORRIS, Pa., 1734–1806. Banker and land speculator; Signer of the Declaration of Independence; Financier of the Revolution; Superintendent of Finance; Organizer of the Bank of North America; 1789–1795, United States Senator; later imprisoned for debt.

WILLIAM PATERSON, N. J., 1745–1806. Lawyer; Delegate in the Continental Congress, 1780–1781; presented the New Jersey plan; 1789–1791, United States Senator; Governor, 1791–1793; Justice in the United States Supreme Court, 1793–1806.

WILLIAM PIERCE, Ga., 1740–1806. Merchant; served in the Revolutionary army; Delegate to the Congress of the Confederation, 1786–1787; refused to sign the Constitution.

CHARLES COTESWORTH PINCKNEY, S. C., 1746–1825. Lawyer; Attorney General of the Colony of South Carolina; Major during the Revolution; had little confidence in popular government; Special Envoy in France in 1796, XYZ affair; Major General in the American Army, 1798; Candidate for Vice-President, 1800; Federalist candidate for President in 1804 and 1808.

CHARLES PINCKNEY, S. C., 1758–1824. Lawyer; member South Carolina Legislature, 1779–1780; Delegate to Continental Congress, 1777–1778, and to Congress of the Confederation, 1784–1787; introduced Pinckney plan in the Convention; Governor, 1789–1792 and 1796–1798, 1806–1808; United States Senator, 1797–1801; Minister to Spain, 1803–1805; Congressman, 1819–1821; advocated in Constitutional Convention that a property qualification of $100,000 be set up for the President and $50,000 for members of Supreme Court.

EDMUND RANDOLPH, Va., 1753–1813. Lawyer; Member of the Virginia Constitution Convention of 1776; Attorney General of the State; Delegate to the Continental Congress; member of the Annapolis Convention; Governor of Virginia, 1786–1788; introduced the Virginia plan; refused to sign the Constitution but defended it and worked for its ratification; Attorney General of the United States, 1789–1794; Secretary of State, 1794–1795.

GEORGE READ, Del., 1733–1798. Lawyer; Member of the Legislature; Attorney General; Signer of the Declaration of Independence; Member of the Continental Congress; Member of the Annapolis Convention; United States Senator, 1789–1793; Chief Justice of Delaware, 1793–1798.

JOHN RUTLEDGE, S. C., 1739–1800. Lawyer; Member of the Stamp Act Congress; Member of the Continental Congresses; President of South Carolina, 1776; Governor of South Carolina, 1779–1782; Chancellor of the State of S. C., 1784; Chief Justice of S. C. Supreme Court, 1791–1795; Justice in U. S. Supreme Court, 1795.

ROGER SHERMAN, Conn., 1721–1793. Shoemaker; Lawyer; Member of the Legislature; Delegate to the Continental Congresses; Signer of the Declaration of Independence; Congressman, 1789–1791; United States Senator, 1791–1793.

RICHARD SPAIGHT, N. C., 1758–1802. Planter; Delegate to the Congress of the Confederation, 1782–1784; Governor, 1792; Congressman, 1798–1801.

CALEB STRONG, Mass., 1745–1819. Lawyer; Member of the Massachusetts Committee of Correspondence, 1774; Member of the General Court, 1776–1778; Member State Senate, 1780–1789; failed to sign the Constitution but favored its ratification; United States Senator, 1789–1796; Governor, 1800–1807 and 1812–1816.

GEORGE WASHINGTON, Va., 1732–1799. Planter; Major in Va. Colonial Army; General during the Revolution; President of the United States, 1789–1797; the richest man in the United States in his day, estimated by Professor Beard to be worth $530,000.

HUGH WILLIAMSON, N. C., 1735–1819. Merchant and physician; Delegate to the Congress of the Confederation; author of the "History of North Carolina"; Congressman, 1789–1793; owned two truckloads of paper currency.

JAMES WILSON, Pa., 1742–1798. Lawyer; born and educated in Scotland; knew more common and international law than any other man in the Convention; Delegate in Continental Congress; Signer of the Declaration of Independence; Associate Justice of the U. S. Supreme Court, 1789–1798.

GEORGE WYTHE, Va., 1726–1806. Lawyer; Member of the Virginia House of Burgesses, 1754–1776; Delegate to Continental Congress; Signer of the Declaration of Independence; Judge of the High Court of Chancery, 1777–1786; Chancellor of the Court, 1786–1806; failed to sign the Constitution but favored its ratification.

ROBERT YATES, N. Y., 1738–1801. Lawyer; Member of the New York Provincial Congress, 1775–1778; refused to sign the Constitution and fought its ratification; Justice of the New York Supreme Court, 1776; Chief Justice, 1790–1798.

XV

LIST OF PERSONS NOMINATED AS CHIEF JUSTICE AND AS ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, 1789–1925 [1]

[The dates of final appointment and nomination to the Senate and the figures as to the votes are taken from the official *Executive Journals of the Senate,* until 1901. The dates after 1901, are from the *Congressional Record.* The order is as follows: date of birth; date of appointment or nomination (the date of receipt of nomination by the Senate, when differing from the date of appointment, being inserted in parentheses); date of confirmation by the Senate; date of rejection; date of final postponement of consideration; date of withdrawal of the nomination; date of declination of office after confirmation.]

John Jay (Chief Justice), born, Dec. 12, 1745; appointed, Sept. 24, 1789; confirmed, Sept. 26, 1789.

John Rutledge, born, —— 1739; appointed, Sept. 24, 1789; confirmed, Sept. 26, 1789; resigned, March 5, 1791.

William Cushing, born, March 1, 1732; appointed, Sept. 24, 1789; confirmed, Sept. 26, 1789.

Robert Hanson Harrison, born, —— 1745; appointed, Sept. 24, 1789; confirmed, Sept. 26, 1789.

James Wilson, born, Sept. 14, 1742; appointed, Sept. 24, 1789; confirmed, Sept. 26, 1789.

John Blair, born, —— 1732; appointed, Sept. 24, 1789; confirmed, Sept. 26, 1789.

James Iredell, born, Oct. 5, 1751; appointed, Feb. 9, 1790; confirmed, Feb. 10, 1790.

Thomas Johnson, born, Nov. 4, 1732; appointed, Aug. 5, 1791, Oct. 31, 1791 (Nov. 1, 1791); confirmed, Nov. 7, 1791.

William Paterson, born, —— 1745; appointed, Feb. 27, 1793; withdrawn Feb. 28, 1793.

William Paterson, appointed, March 4, 1793; confirmed, March 4, 1793.

John Rutledge (Chief Justice), born, —— 1739; appointed, July 1, 1795 (Nov. 5, 1795); rejected, Dec. 15, 1795 (10–14).

William Cushing (Chief Justice), born, March 1, 1732; appointed, Jan. 26, 1796; confirmed, Jan. 27, 1796; declined, Feb. 2, 1796.

Samuel Chase, born, April 17, 1741; appointed, Jan. 26, 1796; confirmed, Jan. 27, 1796.

[1] This list is taken mainly from Warren's *Supreme Court in United States History,* Vol. III, pp. 479–483.

Oliver Ellsworth (Chief Justice), born, April 29, 1745; appointed, March 3, 1796; confirmed, March 4, 1796 (21–1).

Bushrod Washington, born, June 5, 1762; appointed, Sept. 29, 1798 (Dec. 19, 1798); confirmed, Dec. 20, 1798.

Alfred Moore, born, May 21, 1755; appointed, Oct. 20, 1799 (Dec. 6, 1799); confirmed, Dec. 10, 1799.

John Jay (Chief Justice), born, Dec. 12, 1745; appointed, Dec. 18, 1800; confirmed, Dec. 19, 1800; declined, Jan. 2, 1801.

John Marshall (Chief Justice), born, Sept. 24, 1755; appointed, Jan. 20, 1801; confirmed, Jan. 27, 1801.

William Johnson, born, Dec. 27, 1771; appointed, March 22, 1804; confirmed, March 24, 1804.

Henry Brockholst Livingston, born, Nov. 26, 1757; appointed, Nov. 10, 1806, Dec. 13, 1806 (Dec. 15, 1806); confirmed, Dec. 17, 1807.

Thomas Todd, born, Jan. 23, 1765; appointed, Feb. 28, 1807; confirmed, March 3, 1807.

Levi Lincoln, born, May 15, 1749; appointed, Jan. 2, 1811; confirmed, Jan. 3, 1811.

Alexander Wolcott, born, Nov. 12, 1775; appointed, Feb. 4, 1811; rejected, Feb. 13, 1811 (9–24).

John Quincy Adams, born, July 11, 1767; appointed, Feb. 21, 1811; confirmed, Feb. 22, 1811; declined, April, 1811.

Joseph Story, born, Sept. 18, 1779; appointed, Nov. 15, 1811; confirmed, Nov. 18, 1811.

Gabriel Duval, born, Dec. 6, 1752; appointed, Nov. 15, 1811; confirmed, Nov. 18, 1811.

Smith Thompson, born, Jan. 17, 1768; appointed, Sept. 11, 1823 (Dec. 8, 1823); confirmed, Dec. 19, 1823.

Robert Trimble, born, —— 1777; appointed, April 11, 1826; confirmed, May 9, 1826 (27–5).

John Jordan Crittenden, born, Sept. 10, 1787; appointed, Dec. 17, 1828 (Dec. 18, 1828); postponed, Feb. 12, 1829 (27–17).

John McLean, born, March 11, 1785; appointed, March 6, 1829; confirmed, March 7, 1829.

Henry Baldwin, born, Jan. 14, 1780; appointed, Jan. 4, 1830 (Jan. 5, 1830); confirmed, Jan. 6, 1830 (41–2).

James Moore Wayne, born, —— 1790; appointed, Jan. 7, 1835; confirmed, Jan. 9, 1835.

Roger Brooke Taney, born, March 17, 1777; appointed, Jan. 15, 1835; postponed, March 3, 1835 (24–21).

Roger Brooke Taney (Chief Justice), born, March 17, 1777; appointed, Dec. 28, 1835; confirmed, March 15, 1836 (29–15).

Philip Pendleton Barbour, born, May 25, 1783; appointed, Dec. 28, 1835; confirmed, March 15, 1836 (30–11).

William Smith, born, —— 1762; appointed, March 3, 1837; confirmed, March 8, 1837; declined, March, 1837.

John Catron, born, —— 1786; appointed, March 3, 1837; confirmed, March 8, 1837.

John McKinley, born, May 1, 1780; appointed, April 22, 1837 (Sept. 18, 1837); confirmed, Sept. 25, 1837.

Peter Vivian Daniel, born, April 24, 1784; appointed, Feb. 26, 1841 (Feb. 27, 1841); confirmed, March 2, 1841 (22–5).

John Canfield Spencer, born, Jan. 8, 1788; appointed, Jan. 8, 1844 (Jan. 9, 1844); rejected, Jan. 31, 1844 (21–26).

Reuben Hyde Walworth, born, Oct. 26, 1788; appointed, March 13, 1844; postponed, Jan. 15, 1844 (27–20); withdrawn, June 17.

Edward King, born, Jan. 31, 1794; appointed, June 5, 1844; postponed, June 15, 1844 (29–18).

Edward King, appointed, Dec. 4, 1844; postponed, Jan. 23, 1845; withdrawn, Feb. 7, 1845.

Samuel Nelson, born, Nov. 10, 1792; appointed, Feb. 4, 1845. (Feb. 6, 1845); confirmed, Feb. 14, 1845.

John Meredith Read, born, July 21, 1797; appointed, Feb. 7, 1845 (Feb. 8, 1845); not acted upon.

George Washington Woodward, born, March 26, 1809; appointed, Dec. 23, 1845; rejected, Jan. 22, 1846 (20–29).

Levi Woodbury, born, Dec. 22, 1789; appointed, Sept. 20, 1845 (Dec. 23, 1845); confirmed, Jan. 3, 1846.

Robert Cooper Grier, born, March 5, 1794; appointed, Aug. 3, 1846; confirmed, Aug. 4, 1846.

Benjamin Robbins Curtis, born, Nov. 4, 1809; appointed, Sept. 22, 1851 (Dec. 11, 1851); Dec. 29, 1851.

Edward A. Bradford, born, Sept. 27, 1813; appointed, Aug. 16, 1852; not acted upon.

George Edmund Badger, born, April 17, 1795; appointed, Jan. 10, 1853; postponed, Feb. 11, 1853 (26–25).

William C. Micou, —— 1806; appointed, Feb. 24, 1853; not acted upon.

John Archibald Campbell, born, June 24, 1811; appointed, March 21, 1853; confirmed, March 25, 1853.

Nathan Clifford, born, Aug. 18, 1803; appointed, Dec. 9, 1857; confirmed, Jan. 12, 1858 (26–23).

Jeremiah Sullivan Black, born, Jan. 10, 1810; appointed, Feb. 5, 1861 (Feb. 6, 1861); rejected, Feb. 21, 1861 (25–26).

Noah Haynes Swayne, born, Dec. 7, 1804; appointed, Jan. 21, 1862 (Jan. 22, 1862); confirmed, Jan. 24, 1862 (38–1).

Samuel Freeman Miller, born, April 7, 1816; appointed, July 16, 1862; confirmed, July 16, 1862.

David Davis, born, March 9, 1815; appointed, Oct. 17, 1862 (Dec. 1, 1802); confirmed, Dec. 8, 1862.

Stephen Johnson Field, born, Nov. 4, 1816; appointed, March 6, 1863 (March 7, 1863); confirmed, March 10, 1863.

Salmon Portland Chase (Chief Justice), born, Jan. 13, 1808; appointed, Dec. 6, 1864; confirmed, Dec. 6, 1864.

Henry Stanbery, born, Feb. 20, 1803; appointed, April 16, 1866; not acted upon.

Ebenezer Rockwood Hoar, born, Feb. 21, 1816; appointed, Dec. 14 (Dec. 15, 1869); rejected, Feb. 3, 1870 (24–33).

Edwin McMasters Stanton, born, Dec. 19, 1815; appointed, Dec. 20, 1869; confirmed, Dec. 20, 1869 (46–11).

William Strong, born, March 6, 1808; appointed, Feb. 7, 1870 (Feb. 8, 1870); confirmed, Feb. 18, 1870.

Joseph P. Bradley, born, March 14, 1813; appointed, Feb. 7, 1870 (Feb. 8, 1870); confirmed, March 21, 1870 (46–9).

Ward Hunt, born, June 14, 1810; appointed, Dec. 3, 1872 (Dec. 6, 1872); confirmed, Dec. 11, 1872.

George Henry Williams (Chief Justice), born, March 23, 1823; appointed, Dec. 1, 1873 (Dec. 2, 1873); withdrawn, Jan. 8, 1874.

Caleb Cushing (Chief Justice), born, Jan. 17, 1800; appointed, Jan. 9, 1874; withdrawn, Jan. 13, 1874.

Morrison Remick Waite (Chief Justice), born, Nov. 29, 1816; appointed, Jan. 19, 1874; confirmed, Jan. 21, 1874 (63–6).

John Marshall Harlan, born, June 1, 1833; appointed, March 29, 1877 (Oct. 17, 1877); confirmed, Nov. 29, 1877.

William Burnham Woods, born, Aug. 3, 1824; appointed, Dec. 15, 1880; confirmed, Dec. 21, 1880 (39–8).

Stanley Matthews, born, July 21, 1824; appointed, Jan. 26, 1881; not acted upon.

Stanley Matthews, appointed, March 14, 1881 (March 18, 1881); confirmed, May 12, 1881 (24–23).

Horace Gray, born, March 24, 1828; appointed, Dec. 19, 1881; confirmed, Dec. 20, 1881 (51–5).

Roscoe Conkling, born, Oct. 30, 1829; appointed, Feb. 24, 1882; confirmed, March 2, 1882 (39–12); declined, March, 1882.

Samuel Blatchford, born, March 9, 1820; appointed, March 13, 1882; confirmed, March 27, 1882.

Lucius Quintus Cincinnatus Lamar, born, Sept. 17, 1825; appointed, Dec. 6, 1887 (Dec. 12, 1887); confirmed, Jan. 16, 1888 (32–28).

Melville Weston Fuller (Chief Justice); born, Feb. 11, 1833; appointed, April 30, 1888 (May 2, 1888); confirmed, July 20, 1888 (41–20).

David Josiah Brewer, born, Jan. 20, 1837; appointed, Dec. 4, 1889; confirmed, Dec. 18, 1889 (53–11).

Henry Billings Brown, born, March 21, 1836; appointed, Dec. 23, 1890; confirmed, Dec. 29, 1890.

George Shiras, Jr., born, Jan. 26, 1832; appointed, July 19, 1892; confirmed, July 26, 1892.

Howell Edmunds Jackson, born, April 8, 1832; appointed, Feb. 2, 1893; confirmed, Feb. 18, 1893.

William Butler Hornblower, born, May 13, 1851; appointed, Sept. 19, 1893; rejected, Jan. 15, 1894 (24–30).

Wheeler Hazard Peckham, born, Jan. 1, 1833; appointed, Jan. 22, 1894; rejected, Feb. 16, 1894 (32–41).

Edward Douglass White, born, Nov. 3, 1845; appointed, Feb. 19, 1894; confirmed, Feb. 19, 1894.

Rufus Wheeler Peckham, born, Nov. 8, 1838; appointed, Dec. 3, 1895; confirmed, Dec. 9, 1895.

Joseph McKenna, born, Aug. 10, 1843; appointed, Dec. 16, 1897; confirmed, Jan. 21, 1898.

Oliver Wendell Holmes, born, March 8, 1841; appointed, August 11, 1902 (Dec. 2, 1902); confirmed, Dec. 4, 1902.

William Rufus Day, born, April 17, 1849; appointed, Feb. 19, 1903; confirmed, Feb. 23, 1903.

William Henry Moody, born, Dec. 23, 1853; appointed, Dec. 3, 1906; confirmed, Dec. 12, 1906.

Horace Harmon Lurton, born, Feb. 26, 1844; appointed, Dec. 13, 1909; confirmed, Dec. 20, 1909.

Edward Douglass White (Chief Justice), born, Nov. 3, 1845; appointed, Dec. 12, 1910; confirmed, Dec. 12, 1910.

Charles Evans Hughes, born, April 11, 1862; appointed, April 25, 1910; confirmed, May 2, 1910.

Willis VanDevanter, born, April 17, 1859; appointed, Dec. 12, 1910; confirmed, Dec. 15, 1910.

Joseph Rucker Lamar, born, Oct. 14, 1857; appointed, Dec. 12, 1910; confirmed, Dec. 15, 1910.

Mahlon Pitney, born, Feb. 5, 1858; appointed, Feb. 19, 1912; confirmed, March 13, 1912.

James Clark McReynolds, born, Feb. 3, 1862; appointed, Aug. 19, 1914; confirmed, Aug. 29, 1914.

Louis Dembitz Brandeis, born, Nov. 13, 1856; appointed, Jan. 28, 1916; confirmed, June 1, 1916.

John Hessin Clarke, born, Sept. 15, 1857; appointed, July 14, 1916; confirmed, July 24, 1916.

William Howard Taft (Chief Justice), born, Sept. 15, 1857; appointed, June 30, 1921; confirmed, June 30, 1921.

George Sutherland, born, March 25, 1862; appointed, September 5, 1922; confirmed, September 5, 1922.

Pierce Butler, born, March 17, 1866; appointed, November 23, 1922; confirmed, December 21, 1922.

Edward Terry Sanford, born, July 25, 1865; appointed, January 24, 1923; confirmed, January 29, 1923.

Harlan Fiske Stone, born, Oct. 11, 1872; appointed, January 5, 1925; confirmed, February 5, 1925.

XVI

ACTS OF CONGRESS DECLARED UNCONSTITUTIONAL BY THE SUPREME COURT[1]

Act of September 24, 1789 (1 Stat. 80, sec. 13): This section authorized the Supreme Court to issue writs of *mandamus* "in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United

[1] These cases are taken in the main from *The Constitution of the United States* (annotated), compiled by George Gordon Payne.

States." In a suit for a *mandamus* to the Secretary of State, held, that the court had no jurisdiction, since the statute purporting to extend it to cases not named in the Constitution was unconstitutional. (See Art. III, sec. 2, cl. 2.)

Marbury *v.* Madison, 1 Cranch, 137.

Acts of February 25, 1862 (12 Stat. 345), and March 3, 1863 (12 Stat. 709): Clause in legal tender acts making United States notes legal tender for all private and public debts held unconstitutional so far as it applied to debts contracted prior to passage of the act. (See Art. I, sec. 8, cl. 2.)

Hepburn *v.* Griswold, 8 Wall, 603.[2]

Act of March 3, 1863 (12 Stat. 765): Section 14 provided that judgments of the Court of Claims should be estimated for by the Secretary of the Treasury before being paid. Held, that this amounted to a denial of judicial power in the Court of Claims, hence the allowance of an appeal to the Supreme Court was unauthorized. (See Art. III, sec. 1.)

Gordon *v.* U. S., 2 Wall. 561; 117 U. S., 697.

Act of March 3, 1863 (12 Stat. 755, sec. 5): Statute provided for removal to United States circuit courts of cases brought in State courts against Federal officers for arrests, etc., made under authority of the President, the circuit court to try the facts and the law as though the case had been originally brought there. This case was removed after a trial by jury in the State court and a verdict for plaintiff. Held, that act was unconstitutional under the seventh amendment, which provides that "No fact tried by a jury shall be otherwise reëxamined in any court of the United States than according to the common law."

Justices *v.* Murray, 9 Wall. 274.

Acts of June 30, 1864 (13 Stat. 281, sec. 116); March 3, 1865 (13 Stat. 479, sec. 1); July 13, 1866 (14 Stat. 137, sec. 9); March 2, 1867 (14 Stat. 477, sec. 13): Held, that these acts could not constitutionally be applied so as to tax the official salary of a judge of a State court. (See Art. I, sec. 8, cl. 1.)

Collector *v.* Day, 11 Wall. 113.

Act of June 30, 1864 (13 Stat. 284, sec. 112), amended July 13, 1866 (14 Stat. 138): The city of Baltimore had issued its bonds on behalf of the Baltimore & Ohio Railroad, taking a mortgage. Section 122, above, laid a tax of 5 per cent on the interest of bonds of railroads, etc. The Baltimore & Ohio refused to pay; held, that the tax was a tax on the creditor, and that it could not constitutionally be collected from the city of Baltimore, which was a part of the sovereign power of the state. (See Art. I, sec. 8, cl. 1.)

U. S. *v.* Railroad Co., 17 Wall. 322.

[2] This decision was overruled in the Legal Tender Cases (12 Wall. 457).

Act of June 30, 1864 (13 Stat. 311): The act authorized transfer of prize causes from the circuit court to the Supreme Court. Held, that the Supreme Court had no jurisdiction under this act, its jurisdiction in prize cases being under the Constitution appellate only. (See Art. III, sec. 2, cl. 2.)

The *Alicia*, 7 Wall. 571.

Act of January 24, 1865 (13 Stat. 424): Act prohibited all persons from practice before the Federal courts without taking a specified test oath. Garland served in the Confederate Congress, but was pardoned by the President and admitted to the bar of the Supreme Court, the act being held unconstitutional as *ex post facto* and as an interference with the President's pardoning power. (See Art. I, sec. 9, cl. 3, and Art. II, sec. 2, cl. 1.)

Ex parte Garland, 4 Wall. 333.

Act of March 2, 1867 (14 Stat. 484): Statute made it a misdemeanor to sell oil for illuminating purposes inflammable at a temperature less than 110° Fahrenheit. Held unconstitutional as being merely a police regulation of trade within the State. (See Art. I, sec. 8, cl. 3.)

U. S. *v.* De Witt, 9 Wall. 41.

Act of May 31, 1870 (16 Stat. 140): Section 3 laid a penalty on State election officers, etc., for refusal to receive vote of "any citizen" who had duly offered to qualify as voter; and section 4 penalized the obstruction of "any citizen" from qualifying as a voter. Held, that not being limited to discrimination on account of race, color, or previous condition of servitude, this legislation was beyond the limit of the fifteenth amendment and was unauthorized.

U. S. *v.* Reese, 92 U. S., 214.

Act of July 12, 1870 (16 Stat. 235): The act carrying appropriations for the payment of judgments of the Court of Claims contained a proviso that no pardon of the President, etc., should be admissible to establish the standing of any claimant or his right to bring suit, etc., under the abandoned and captured property acts. Held unconstitutional as an interference with the pardoning power of the President; and, further, since the party in question had received a judgment of the Court of Claims, affirmed by the Supreme Court, it was an interference with the judicial power. (See Art. II, sec. 2, cl. 1, and Art. III, sec. 1.)

U. S. *v.* Klein, 13 Wall. 128.

Revised Statutes, section 860: [3] Provided that no evidence obtained from a witness by means of a judicial proceeding should be used against him in any criminal proceedings, etc. Refusal to answer certain questions upheld and act declared invalid, in view of the fifth amendment, because not affording the witness absolute im-

[3] Act has been expressly repealed.

munity against future prosecution for the offense to which the question related.

Counselman *v.* Hitchcock, 142 U. S., 547.

Revised Statutes, sections 1977, 1978, 1979, 5508, and 5510 give the United States courts no jurisdiction of a charge of conspiracy made and carried out in a State to prevent citizens of African descent from making or carrying out contracts and agreements to labor. Held: Unless the thirteenth amendment vests jurisdiction in the National Government the remedy for wrong committed by individuals in such cases is through State action and State tribunals.

Hodges *v.* U. S., 203 U. S., 1.

Revised Statutes sections 4937–4947: These sections were trademark regulations which in terms applied to all commerce, while congressional authority is under the Constitution limited to interstate commerce. The act of August 14, 1876 (19 Stat. 141), approved in pursuance of the above legislation was also condemned as applied to State commerce. (See Art. I, sec. 8, cl. 3.)

Trade-mark Cases, 100 U. S., 82.

Revised Statutes, section 5132, subdivision 9,[1] made criminal the obtaining of goods under false pretenses by a person against whom within three months thereafter bankruptcy proceedings should be commenced, and the court held that that is a matter which concerned only the State in which the act was committed. (See Art. I, sec. 8, cl. 4.)

U. S. *v.* Fox, 95 U. S., 670.

Revised Statutes, section 5507,[1] made criminal the hindrance by individuals of the right of suffrage guaranteed by the fifteenth amendment. Held, that the amendment applied only to action by the United States or the several States.

James *v.* Bowman, 190 U. S., 127.

Revised Statutes, section 5519: A statute penalizing conspiracy by individuals to deprive any person of the equal protection of the laws, being directed against private action, without reference to the laws of the State, is not authorized by the thirteenth, fourteenth, or fifteenth amendments or section 2 of Article IV of the Constitution.

U. S. *v.* Harris, 106 U. S., 629; Baldwin *v.* Franks, 120 U. S., 678.

Revised Statutes (D. C.), section 1064; Statute dispensing with jury in prosecutions by information in the police court of the District of Columbia. Held unconstitutional as a basis for conviction and sentence by the police court on an information for conspiracy; the provision of the Constitution requiring jury in trial for crimes, being in force in the District of Columbia. (See Art. III, sec. 2, cl. 3.)

Callan *v.* Wilson, 127 U. S., 540.

Act of June 22, 1874 (18 Stat. 186): The act authorized the court, in civil proceedings under the revenue laws, to require the

production of private papers, etc., in an information for forfeiture of certain goods. Held, that the act was unconstitutional as repugnant to the fourth amendment restricting unreasonable searches and seizures, and to the spirit of the fifth amendment, the proceedings being criminal in effect.

Boyd *v.* U. S., 116 U. S., 616.

Act of March 1, 1875 (18 Stat. 335, c. 114): Statute declared all persons entitled to equal enjoyment of facilities of inns, public conveyances, etc., and stated a penalty on persons violating this provision. Held, that fourteenth amendment applied to State action, and thirteenth amendment related only to slavery and involuntary servitude; hence no constitutional basis for the act.

Civil Rights Cases, 109 U. S., 3; Butts *v.* Merchants Transp. Co., 230 U. S., 126.

Act of March 3, 1875 (18 Stat. 479): [4] Statute made a judgment against an embezzler of United States property "conclusive evidence" in a prosecution against a receiver of the stolen property. Held unconstitutional under the sixth amendment, which entitles an accused person to be confronted with the witnesses against him.

Kirby *v.* U. S., 174 U. S., 47.

Act of August 11, 1838 (25 Stat. 400, 411): The power of Congress to regulate commerce among the States, granted by Art. I, sec. 8, cl. 3, is subject to the limitations imposed by the fifth amendment, requiring that just compensation be paid for private property taken for public uses, so that in condemning a certain lock and dam just compensation includes a payment for the franchise to take tolls.

Monongahela Nav. Co. *v.* U. S., 148 U. S., 312.

Act of May 5, 1892 (27 Stat. 25): This act prescribed a term of imprisonment at hard labor for Chinese persons convicted of illegal residence in the United States. Held, that Wong Wing, though an alien, being within the territory of the United States, was entitled to the benefits of the fifth and sixth amendments; that is, to a judicial trial to establish his guilt. Under the act Chinese were given summary hearing before a justice or commissioner.

Wong Wing *v.* U. S., 163 U. S., 228.

Act of August 27, 1894 (28 Stat. 509): The act laid taxes upon rents or income derived from real estate, or from the interest on municipal bonds. Held, that the tax on income from real estate was a direct tax within the meaning of section 9 of Article I of the Constitution, and that the tax on interest on municipal bonds was a tax on the power of the State, etc., to borrow money, and therefore repugnant to the Constitution.

Pollock *v.* Farmers', etc., Co., 157 U. S., 429; 158 U. S., 601.

Act of January 30, 1897 (29 Stat. 506): Act made it unlawful to give or sell, etc., intoxicating liquors to any Indian to whom allot-

[4] Act has been expressly repealed.

ment of land had been made, while the title is held in trust by the Government, etc. Held, that an Indian, upon an allotment being made, becomes a citizen of the United States and no longer a ward of the Government, and that the district court had no jurisdiction, under this statute, to punish a sale of liquor to an allottee Indian. (See amend. 14. — "Citizenship.")

Matter of Heff, 197 U. S., 488.

Act of June 1, 1898 (30 Stat. 424): [5] Act declared interstate carriers guilty of a misdemeanor who should threaten any employee with loss of employment because of his membership in labor organization. Held, that the power to regulate interstate commerce means power to prescribe rules governing such commerce having a substantial relation to the commerce regulated; that there was no such real connection in the present case. (See Art. I, sec. 8, cl. 3.)

Adair *v.* U. S., 208 U. S., 161.

Act of June 13, 1898 (30 Stat. 448): [6] Stamp tax on foreign bills of lading held in conflict with Article I, section 9, clause 5, of the Constitution, as in effect a duty on exports.

Fairbank *v.* U. S., 181 U. S., 283.

Act of June 13, 1898 (30 Stat. 448, 460): [1] The act laid a tax of $3 to $10 on the charter parties of "any ship or vessel or steamer." Held, that in so far as it related to the charter party of a vessel in foreign trade, it was invalid, being in substance a tax on exportation, and, as such, a tax on the exports.

U. S. *v.* Hvoslef, 237 U. S., 1.

Act of June 6, 1900 (31 Stat. 321, 358): Provision in the Alaska Code that in trial for a misdemeanor six persons should constitute a legal jury held unconstitutional, since from the treaty of acquisition and subsequent legislation it is apparent that Alaska has been incorporated into the United States and is therefore entitled to the benefit of the sixth amendment.

Rassmussen *v.* United States, 197 U. S., 516.

Act of March 3, 1901 (31 Stat. 1341): An appeal by the United States, in a prosecution for murder in which the defendant had been found not guilty, taken under section 935 of the District of Columbia Code, was dismissed, such an appeal being practically a moot case and a decision thereon not the exercise of judicial power. (See Art. III, sec. 2, cl. 2.)

U. S. *v.* Evans, 213 U. S., 297.

Act of June 11, 1906 (34 Stat. 232): The act made interstate carriers liable to their employees for injuries, etc., resulting from negligence of their officers, of insufficiency of roadbed, etc. Whole act held unconstitutional because expressed in general language which would cover cases occurring strictly within the limits of one

[5] Act has been expressly repealed.

State, as to which Congress had no power under the commerce clause. (Art. I, sec. 8, cl. 3.)

Employers' Liability Cases, 207 U. S., 463.

Act of February 20, 1907 (34 Stat. 898, sec. 3): [6] Statute made it felony to harbor an alien prostitute within three years of entry. An indictment against a person harboring such an alien, without knowledge of her alienage and not in connection with her entry, was quashed on ground that the jurisdiction of Congress over immigration does not extend to such an exercise of the police power. (See Amendment 14.)

Keller *v.* U. S., 213 U. S., 138.

Act of March 1, 1907 (34 Stat. 1015, 1028): Statute authorized certain Indians to bring suit in the Court of Claims to "determine the validity of any acts of Congress passed since the said act of July 1, 1902, in so far as said acts, or any of them, attempt to increase or extend the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands of Cherokee Indians," etc. Petition brought under this act dismissed for want of jurisdiction, such a suit not being in the sense of the Constitution a "case or controversy," as specified in Article III, section 2.

Muskrat *v.* U. S., 219 U. S., 346.

Act of September 1, 1916 (39 Stat. 675): Act prohibited interstate transportation of goods made in factories employing child labor. Held unconstitutional as exceeding the commerce power of Congress, the necessary effect being a regulation of the hours of labor of children, a matter solely within State authority. (See Art. I, sec. 8, cl. 3, and Amendment 10.)

Hammer *v.* Dagenhart, 247 U. S., 251.

Act of October 6, 1917 (40 Stat. 395): The act amended the Judicial Code relating to admiralty jurisdiction by saving "to claimants the rights and remedies under the workmen's compensation law of any State," held unconstitutional as an attempt to delegate the legislative power of Congress under Article I, section 8, clause 18, and section 2, Article III, of the Constitution.

Knickerbocker Ice Co. *v.* Stewart, 253 U. S., 149.

Act of February 24, 1919 (40 Stat. 1062, sec. 213): Tax on the net income of a district judge by including his official salary in the computation diminishes that compensation, in violation of Article III, section 1, of the Constitution, and is invalid. (See also Amendment 16.)

Evans *v.* Gore, 253 U. S., 245.

Act of August 10, 1917 (40 Stat. 276, sec. 4; amended by act of October 22, 1919, 41 Stat. 297, sec. 2): The clause of the food control act penalizing sales, etc., of necessaries "at unjust or unreasonable rate of charge" held unconstitutional because penalizing an action without setting up an ascertainable standard of guilt, and

therefore repugnant to the fifth and sixth amendments, which require due process of law and that persons accused of crime shall be "informed of the nature and cause of the accusation," etc.

U. S. *v.* Cohen Grocery Co., 255 U. S., 81.
Weeds *v.* U. S., 255 U. S., 109.

Section 8 of the Federal corrupt practices act (June 25, 1910, 36 Stat. 822; amended August 19, 1911, 37 Stat. 25), which undertakes to limit the amount of money which any candidate for the office of Representative in Congress or of United States Senator shall give, contribute, expend, use, or promise, or cause to be given, contributed, etc., in procuring his nomination or election held unconstitutional as applied to a primary election of candidates for a seat in the Senate. (See Art. I, sec. 4.)

Newberry *v.* U. S., 256 U. S., 232.

Act of August 24, 1921 (42 Stat. 187), known as the futures trading act: Under section 11 of the act, directing severance of valid from invalid provisions and applications, sec. 9, which authorizes investigations by the Secretary of Agriculture, and *semble,* section 3, imposing a tax on certain kinds of options of purchase or sale of grain, are unaffected by the conclusion that section 4, imposing the tax on sales for future delivery, and the regulations interwoven with it in subsequent sections, held invalid.

Hill *v.* Wallace, 259 U. S. 44.

Act of February 24, 1919 (40 Stat. 1138): Held tax on child-labor-made articles (title 12, revenue act of 1918) unconstitutional. (Art. I, sec. 8, cls. 1 and 3, and Amendment 10.)

Baily *v.* Drexel Furn. Co., 259 U. S., 120.

Act of September 19, 1918 (40 Stat. 960), authorizing a board to fix wages for women and children in the District of Columbia, and providing punishment of fine and imprisonment for anyone paying a less wage than the fixed one, was held unconstitutional as a deprivation of one's liberty to contract without due process of law, under the fifth amendment.

Adkins *v.* Children's Hospital, 261 U. S., 525.

Act of March 4, 1913 (37 Stat. 974): Paragraph 64 of section 8 held void in so far as it attempted to empower the court to amend and enlarge valuations, rates, and regulations established by the public utilities commission of the District of Columbia and to make such order as in its judgment the commission should have made.

Keller *v.* Potomac Elec. Co., 261 U. S. 428.

Act of June 10, 1922 (42 Stat. 634), which, by amendment of the Judicial Code, undertakes to permit application of the workmen's compensation laws of the several states to injuries within the admiralty and maritime jurisdiction, excepting the masters and crews of vessels, held unconstitutional, for the reasons explained in Southern Pacific Co. *v.* Jensen (244 U. S. 205).

Washington *v.* Dawson Co., 264 N. S. 219.

XVII

LIST OF CASES IN WHICH THE SUPREME COURT HAS HELD ACTS OF CONGRESS UNCONSTITUTIONAL[1]

Date	*Cases*	*Acts of Congress*	*Statutes at Large*
1793	U. S. *v.* Todd, 13 How. 40.	Mar. 23, 1792.	1 Stat. 243.
1803	Marbury *v.* Madison, 1 Cranch 137.	Sept. 24, 1789, § 13.	1 Stat. 81.
1857	Scott *v.* Sanford, 19 How. 393.	Mar. 6, 1820, § 8.	3 Stat. 548.
1864	Gordon *v.* U. S., 2 Wall 561, 117 U. S. 697.	Mar. 3, 1863.	12 Stat. 766.
1866	Exparte Garland, 4 Wall 333.	Jan. 24, 1865.	13 Stat. 424.
1867	Reichart *v.* Felps, 6 Wall 160.	Feb. 20, 1812.	2 Stat. 677.
1868	The Alicia, 7 Wall 571.	June 30, 1864, § 13.	13 Stat. 310.
1870.	Hepburn *v.* Griswold, 8 Wall 603.	Legal Tender Acts, 1862–3.	12 Stat. 345, 532, 709.
1869	U. S. *v.* Dewitt, 9 Wall 41.	Mar. 2, 1867, § 29.	14 Stat. 484.
1869	The Justices *v.* Murray, 9 Wall 274.	Mar. 3, 1863, § 5.	12 Stat. 756.
1870	Collector *v.* Day, 11 Wall 113.	Income Tax Acts, 1864–5–6–7.	13 Stat. 281, 479; 14 Stat. 137, 477.
1871	U. S. *v.* Klein, 13 Wall 128.	July 12, 1870.	16 Stat. 235.
1873	U. S. *v.* Railroad Co., 17 Wall 322.	June 30, 1864 (as amended, July 13, 1866).	14 Stat. 98, 138.
1875	U. S. *v.* Reese, 92 U. S. 214.	May 31, 1870.	16 Stat. 140.
1877	U. S. *v.* Fox, 95 U. S. 670.	Mar. 2, 1867.	14 Stat. 539; R. S. 5123 Sub. § 9.
1879	Trade Mark Cases, 100 U. S. 82.	July 8, 1870; Aug. 14, 1876.	16 Stat. 210, 211, 212; 19 Stat. 141; R. S. 4937–47.
1882	U. S. *v.* Harris, 106 U. S. 629.	April 20, 1871.	17 Stat. 13; R. S. 5519.
1883	Civil Rights Cases, 109 U. S. 3. (Cf. Butts *v.* Trans. Co., infra.)	Mar. 1, 1875, §§ 1–2.	18 Stat. 335.
1886	Boyd *v.* U. S., 116 U. S. 616.	June 22, 1874, § 5.	18 Stat. 187.

[1] *American Bar Association Journal*, June 1924, p. 425.

Date	*Cases*	*Acts of Congress*	*Statutes at Large*
1887	Baldwin *v.* Franks, 120 U. S. 678.	Apr. 20, 1871.	17 Stat. 13; R. S. 5519.
1888	Callan *v.* Wilson, 127 U. S. 540.	June 25, 1868.	15 Stat. 76; R. S. Dist. Col. § 1064.
1892	Counselman *v.* Hitchcock, 142 U. S. 547.	Feb. 25, 1868.	15 Stat. 37; R. S. 860.
1893	Monongahela Nav. Co. *v.* U. S., 148 U. S. 312.	Aug. 11, 1888.	25 Stat. 411.
1895	Pollock *v.* Farmers Loan & Tr. Co., 157 U. S. 429, 158 U. S. 601.	Aug. 27, 1894, §§ 27–37.	28 Stat. 553.
1896	Wong Wing *v.* U. S., 163 U. S. 228.	May 5, 1892, § 5.	27 Stat. 25.
1899	Kirby *v.* U. S., 174 U. S. 47.	Mar. 3, 1875.	18 Stat. 479.
1901	Fairbanks *v.* U. S., 181 U. S. 283.	June 13, 1898.	30 Stat. 459, 462.
1903	James *v.* Bowman, 190 U. S. 127.	May 31, 1870.	16 Stat. 141; R. S. 5507.
1905	Matter of Heff, 197 U. S. 488.	Jan. 30, 1897.	29 Stat. 506.
1905	Rasmussen *v.* U. S., 197 U. S. 516.	June 6, 1900, § 171.	31 Stat. 358.
1906	Hodges *v.* U. S., 203 U. S. 1.	May 31, 1870; Mar. 1, 1875.	16 Stat. 144; 18 Stat. 336; R. S. 1977.
1908	Employers' Liability Cases, 207 U. S. 463.	June 11, 1906.	34 Stat. 232.
1908	Adair *v.* U. S., 208 U. S. 161.	June 1, 1898.	30 Stat. 428.
1909	Keller *v.* U. S., 213 U. S. 138.	Feb. 20, 1907, § 3.	34 Stat. 899.
1909	U. S. *v.* Evans, 213 U. S. 297.	Mar. 3, 1901.	31 Stat. 1341; D. C. Code, § 935.
1911	Muskrat *v.* U. S., 219 U. S. 346.	Mar. 1, 1907.	34 Stat. 1028.
1911	Coyle *v.* Oklahoma, 221 U. S. 559.	June 16, 1906.	34 Stat. 269.
1913	Butts *v.* Merchants Trans'n Co., 230 U. S. 126.	Mar. 1, 1875, §§ 1–2.	18 Stat. 336.
1915	U. S. *v.* Hvoslef, 237 U. S. 1.[1]	June 13, 1898.	30 Stat. 460.
1918	Hammer *v.* Dagenhart, 247 U. S. 251.	Sept. 1, 1916.	39 Stat. 675–6.

[2] See also Thames & Mersey Marine Insurance Co. *v.* U. S., 237 U. S., 19.

Date	*Cases*	*Acts of Congress*	*Statutes at Large*
1920	Eisner *v.* Macomber, 252 U. S. 189.	Sept. 8, 1916.	39 Stat. 757.
1920	Knickerbocker Ice Co. *v.* Stewart, 253 U. S. 149.	Oct. 6, 1917.	40 Stat. 395.
1920	Evans *v.* Gore, 253 U. S. 245.	Feb. 24, 1919, § 213.	40 Stat. 1065.
1921	U. S. *v.* Cohen Grocery Co., 255 U. S. 81.	Aug. 10, 1917, § 4; Oct. 22, 1919, § 2.	40 Stat. 276; 41 Stat. 297.
1921	Newberry *v.* U. S., 256 U. S. 232.	June 25, 1910; Aug. 19, 1911.	36 Stat. 822; 37 Stat. 25.
1921	Hill *v.* Wallace, 259 U. S. 44.	Aug. 24, 1921.	42 Stat. 187.
1922	U. S. *v.* Moreland, 258 U. S. 433.	Mar. 23, 1906.	34 Stat. 86.
1922	Hill *v.* Wallace, 259 U. S. 44.	Aug. 24, 1921.	42 Stat. 187.
1922	Lipke *v.* Lederer, 259 U. S. 557.	Oct. 28, 1919.	41 Stat. 317.
1922	Child Labor Tax Case, 259 U. S. 20.	Feb. 24, 1919.	40 Stat. 1057, 1138.
1923	Adkins *v.* Children's Hospital, 261 U. S. 525.	Sept. 19, 1918.	40 Stat. 960.
1923	Keller *v.* Potomac Electric Co., 261 U. S. 428.	Mar. 4, 1913.	37 Stat. 974.
1924	Washington *v.* Dawson Co., 264 U. S. 219.	June 10, 1922.	42 Stat. 634.

XVIII

DECLARATIONS OF PARTIES AND CANDIDATES AS REGARDS THE SUPREME COURT AND THE CONSTITUTION DURING THE PRESIDENTIAL CAMPAIGN OF 1924

PRESIDENT COOLIDGE[1]

While we are discussing some of the problems of the day, some of the changes we propose to meet temporary conditions, it is also well to remember that it is equally necessary to support our fundamental institutions. We believe in our method of constitutional government and the integrity of the legislative, judicial, and executive departments. We believe that our liberties and our rights are best preserved, not through political, but through judicial action. The Constitution is the sole source and guaranty of national

[1] From President Coolidge's Address of Acceptance of his nomination for the Presidency by the Republican Party on August 14, 1924.

freedom. We believe that the safest place to declare and interpret the Constitution which the people have made is in the Supreme Court of the United States.

JOHN W. DAVIS

"These proposed amendments can have no other purpose than an entire change in our Constitutional system, for in attempting to destroy or limit the power of the Supreme Court to adjudicate upon the constitutionality of legislation we are giving up at one stroke not merely our belief in the separation of judicial and legislative powers but our reliance upon the Constitution as the supreme law of the land. . . . When all such proposals are reduced to their simplest terms they stand forth naked and undisguised as an attack on our theory of government under a written Constitution."

THE LA FOLLETTE PLATFORM

We favor submitting to the people, for their considerate judgment, a constitutional amendment providing that Congress may by enacting a statute make it effective over a judicial veto.

We favor such amendment to the Constitution as may be necessary to provide for the election of all Federal Judges, without party designation, for fixed terms not exceeding ten years, by direct vote of the people.

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